TRUST AND BUSINESS ACCOUNTING FOR ATTORNEYS

PRACTICAL SKILLS SERIES

2008 Edition Written by

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PREFACE

The lawyer's responsibility to maintain inviolate the funds of clients and to account fully and unhesitatingly therefor lies at the bedrock of public confidence in the legal profession. Clients have for centuries trusted lawyers to handle their funds simply because of their respect for the legal profession. As former Chief Justice Robert N. Wilentz put it:

> It is a trust built on centuries of honesty and faithfulness.
>
> ***
>
> No other explanation can account for clients' customary willingness to entrust their funds to relative strangers simply because they are lawyers. *In re Wilson,* 81 N.J. 451 (1979).

Over 40 years ago in 1967, New Jersey adopted a detailed recordkeeping rule, *R.*1:21-6 (Appendix A), governing trust and business accounting. All attorneys are charged with knowledge of and responsibility for compliance with its mandates. The enactment of *R.*1:21-6 served as the foundation for the education of New Jersey lawyers regarding their trust and business accounting responsibilities. Then, in 1978, the Lawyer's Fund For Client Protection recommended, and the Supreme Court of New Jersey supported, development of one of the first Random Audit Compliance Programs in the country. With the full support of New Jersey lawyers, that program began conducting audits in 1981. Its primary purposes are to check compliance with *R.*1:21-6, to educate the Bar and avoid improper recordkeeping practices.

Another key component in trust accounting education was my recommendation and the Supreme Court's adoption in 1987 of a rule requiring that trust and business accounting be a mandatory part of the New Jersey Skills and Methods Course (*R.*1:26). As a result, each and every attorney admitted since 1987 has been specifically educated on proper trust and business accounting procedures.

The first book on *Trust and Business Accounting for Attorneys* was published in 1986. It is distributed to all Skills and Method Course participants. Through publication by the New Jersey Institute for Continuing Legal Education (I.C.L.E.), not only new bar members, but, also, many older practitioners, have availed themselves of this resource.

Trust and Business Accounting for Attorneys has also filled a void that extends beyond New Jersey. In 1989 the Board of Professional Responsibility of the Supreme Court of Tennessee issued Formal Ethics Opinion 89-F-121 entitled "The Mechanics of Trust Accounting," which adopted verbatim a large portion of this New Jersey treatise. That same year, the State of Virginia was given permission to reproduce the New Jersey treatise with attribution on a not for profit basis. In 1992 the California State Bar Association developed a

"Handbook on Client Trust Accounting for California Attorneys" with acknowledgment that the idea arose out of this New Jersey work. After years of obscurity, the subject of a lawyer's fiduciary responsibilities is finally receiving the attention it clearly deserves.

With the leadership of the Supreme Court of New Jersey, as well as the support of the lawyers in this State, we are well on our way to ensuring that lawyers know their duty to protect the public through scrupulous adherence to their fiduciary obligations. Moreover, this work on *Trust and Business Accounting for Attorneys* will lead every lawyer to realize that full compliance with our recordkeeping rule is not only easy, but helpful for the attorney as well.

During my years in the disciplinary system in New Jersey, it has become obvious that it is the small firm practitioners who will benefit most from these educational programs. Larger firms establish committees to review firm accounting procedures. Most larger firms have full-time bookkeepers, and accounting firms are also on retainer. According to 2007 statistics compiled from our Annual Attorney Registration Statement, there are 34,166 lawyers in the private practice who responded to indicate their firm size. Based upon these responses to questions regarding the size of their firm, it is estimated that those lawyers practice in 14,852 law firms. Three-quarters of all private law firms (74.4%) are sole practitioners, 11.4% are in two-person firms, and 8.9% are in firms of from three to five attorneys. It is this overwhelming majority of small firm private practitioners to whom this work is primarily addressed and for whom the systems have been designed. Rule 1:21-6 and the systems discussed in this book are based upon the commonly used double-entry bookkeeping model.

For additional information on our Random Audit Program, the names of qualified financial institutions approved as trust account depositories and other information about New Jersey's attorney discipline and fee arbitration programs, log onto the Office of Attorney Ethics website at: www.judiciary.state.nj.us/oae/index.htm.

I acknowledge with gratitude those who have contributed to this work. The entire staff of our Random Audit Compliance Program has been instrumental in influencing its contents. Their daily work with attorneys in the field insures that this work keeps hold of the pulse of private practice.

JULY 7, 2008

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CHAPTER 1 — THE IMPORTANCE OF FIDUCIARY RESPONSIBILITIES

Section 1.0 Why Every Attorney Must Know Trust and Business Accounting

There are many reasons why all attorneys engaged in the private practice of New Jersey law must know and understand proper trust and business accounting and recordkeeping practices. Chief Justice Arthur Vanderbilt concisely summarized the primary reason over fifty years ago when he stated that:

> [E]very well advised lawyer who values either his reputation or his license to practice law has two bank accounts, one an attorney's account for funds that are not his, and the other a personal account for moneys that are exclusively his own. . . . *In re Wittreich*, 5 N.J. 79, 81 (1950).

These same basic requirements have been repeated often over the years. See, for example, *In re Banner*, 31 N.J. 24, 28 (1959), *In re Lederman*, 45 N.J. 524, 525 (1965) and *In re Makowski*, 73 N.J. 265, 271 (1977). Nevertheless, attorneys have occasionally asserted their ignorance as a defense. Such a defense has routinely been repudiated.

> The defense of ignorance of the law is not to be favorably considered by (the) Court, especially when the person raising it is presumed to be an expert in the law. *In re Wittreich*, 5 N.J. 79, 87 (1950).

> We view with increasing concern the practice of attorneys facing discipline in this Court to treat the applicable disciplinary rules (governing trust accounts) as **terra incognita.**
>
> Although the astonishing lack of familiarity with the rules is sometimes characterized as a "defense," ignorance of our rules and case law cannot be permitted to diminish responsibility for conduct in violation of these rules. *In re Eisenberg*, 75 N.J. 454, 456, n.1 (1978).

Section 1.1 Ethical Responsibilities

Attorneys' ethical responsibilities regarding trust funds or property coming into their hands basically involve six duties:

A. Duty to Maintain Required Records

Every attorney has a duty to properly maintain required trust and business account books and records as specified in recordkeeping Rule 1:21-6 (Appendix A). In 1986 the Supreme Court issued this reminder to the Bar:

> Attorneys must recognize that part of their responsibility to the legal system is the maintenance and supervision of accounting records. There can be no excuse for inadequate recordkeeping particularly in light of the technological and relatively inexpensive means available today. *In re Orlando*, 104 N.J. 344, 350 (1986).

Violation of the duty to maintain required records in its purest form assumes that an attorney has maintained the separate integrity of client funds, but has not maintained the complete and detailed records regarding their handling that are required under *R.*1:21-6. See RPC 1.15(a) and (d). An attorney who fails to maintain the required records "shall be deemed to be in violation of RPC 1.15(d)." *R.*1:21-6(i). Public discipline has been imposed for gross recordkeeping violations. *In re Fucetola*, 101 N.J. 5 (1985); *In re Macias*, 121 N.J. 243 (1990); *In re Carroll*, 165 N.J. 566 (2000); *In re Wood*, 170 N.J. 628 (2002).

B. Duty To Account

An attorney has a duty to fully account to the client for funds or property coming into the attorney's hands. Whether proper records are maintained or not, an attorney must nevertheless account to a client for the handling of funds. This may be done by reconstructing the events surrounding the receipt, maintenance and distribution of clients' funds. RPC 1.15(a)(Appendix B). The duty to account runs, not only to clients, but to others to whom the attorney owes a duty, such as heirs of an estate. *In re Rea,* 143 N.J. 385 (1996).

C. Duty To Notify Promptly

The next responsibility of an attorney is to notify clients promptly on the receipt of "funds or other property in which a client . . . has an interest." RPC 1.15(b). Since the funds belong to the client, necessary decisions about what to do with the funds require that the client be notified of their receipt. For this reason, client notification should be given just as soon as practical. For the lawyer's protection, the notice should be given in writing. *In re Stein,* 97 N.J. 550, 564 (1984).

D. Duty To Pay Promptly

In addition to promptly notifying the client of receipt of funds and other property, the attorney has a correlative duty to "promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive." RPC 1.15(b)(Appendix B). Thus, if the client has authorized the attorney as part of a tort settlement to pay certain medical bills and they are not paid promptly, the attorney has violated the ethical duty to follow the directions of the client by making prompt disbursement of the client's funds.

Naturally, no payments may be made until the funds are first deposited into the attorney's trust account and are collected by the attorney's financial institution. (See Section 4.10). Collected funds should be disbursed as soon as it is practical to do so. Gross violations of this duty have resulted in discipline. *In re Cosgrove*, 108 N.J. 684 (1987); *In re Halpern*, 117 N.J. 678 (1989).

E. Duty To Segregate

Sometimes referred to as the duty not to commingle clients' funds and property, this duty requires an attorney to keep clients funds "separate from the lawyer's own property." RPC 1.15(a). The duty has been described thusly:

> The funds in the hands of an attorney that belongs to a client or others must be kept inviolate. *In re Banner*, 31 N.J. 24, 28 (1959).

This duty is breached the moment the separate identity of the particular client's funds is lost. Classically, the only way to avoid commingling would be to establish a separate account for each client. Recognizing the practical difficulties of such a literal reading, our recordkeeping rule authorizes an exception, a controlled commingling of one client's trust funds with trust funds of other clients, provided strict, detailed recordkeeping practices are maintained. An attorney's own funds, however, are **never** permitted to be deposited into trust accounts holding clients' funds. This is called active commingling. There is one strictly limited exception allowed by RPC 1.15(a) that permits a reasonable amount of attorney funds to be deposited in the trust account to pay bank charges and is discussed later in Section 4.7. Commingling, referred to as passive commingling, also occurs when an attorney fails to promptly withdraw from the trust account legal fees to which the attorney is entitled. (See Section 4.6).

F. Duty To Preserve Integrity Of Client Funds

The single most important duty in handling trust funds is the duty to refrain from using those funds for any purpose whatsoever, other than as directed by the client. The violation of this ethical duty has, in the past, had many pseudonyms: peculation, conversion, misuse,

defalcation, embezzlement, theft and others. Since 1979, however, a single term, "misappropriation," has defined the violation of the duty owed. Misappropriation is defined as:

> [A]ny unauthorized use by the lawyer of clients' funds entrusted to him, including not only stealing, but also unauthorized temporary use for the lawyer's own purpose, whether or not he derives any personal gain or benefit therefrom. *In re Wilson*, 81 *N.J.* 451, 455 n.1 (1979).

Misappropriation thus occurs, not only when an attorney uses clients' funds to pay personal obligations but also, for example, when the attorney disburses trust funds of one client before the deposits, which are the source of the disbursement, are collected through the banking process.

The importance of avoiding all situations which could be characterized as knowing misappropriation was underlined by former Chief Justice Robert N. Wilentz in the first paragraph of the 1979 landmark *Wilson* case:

> In this case respondent knowingly used his clients' money as if it were his own. We hold that disbarment is the only appropriate discipline. We also use this occasion to state that generally all such cases shall result in disbarment. We foresee no significant exceptions to this rule and except the result to be almost invariable. *Id.* at 453.

Thereafter, Chief Justice Deborah T. Poritz reaffirmed the rule of disbarment as the only appropriate sanction for an attorney's knowing misappropriation of clients' trust funds in the case of *In re Greenberg*:

> Today, we again reaffirm the rule announced in *Wilson* and hold that disbarment is the appropriate sanction in cases where it has been shown, by clear and convincing evidence, that an attorney has knowingly misappropriated client funds. We accept as an inevitable consequence of the application of this rule that rarely will an attorney evade disbarment in such cases. Public confidence in the "integrity and trustworthiness of lawyers" requires no less. 155 N.J. 138, 151 (1998) (citing *In re Wilson*)

Thus, almost thirty years of jurisprudence confirms that a finding of knowing misappropriation will result in virtually automatic disbarment. Furthermore, disbarment in New Jersey is permanent. *R.*1:20-15A(a)(1).

During the past almost thirty years, attorneys have made numerous attacks on the *Wilson* rule in an attempt to reduce its applicability. The first attack was to question whether a "knowing" misappropriation required an intent to defraud or permanently deprive clients of their funds. In the case of *In re Noonan*, 102 N.J. 157 (1986), the Court explained that no such intent was required:

> The misappropriation that will trigger automatic disbarment under *In re Wilson* . . . consists simply of a lawyer taking a client's money entrusted to him, knowing that it is the client's money and knowing that the client has not authorized the taking.
>
> * * *
>
> [I]t is the mere act of taking your client's money knowing that you have no authority to do so that requires disbarment. *Id.* at 160.

See also *In re Silvia,* 152 N.J. 243 (1998).

The second offensive asserted that there may yet be some mitigating factors which would ameliorate the *Wilson* rule. In *Wilson* the Court determined that the following mitigating factors were irrelevant:

- restitution;
- youth and inexperience;
- age or prior outstanding career; and
- current compliance with proper recordkeeping requirements.

This list of irrelevant mitigating factors was expanded by caselaw to include the following additional items:

In re Noonan, 102 N.J. 157 (1986):

- use of the money for a good or bad purpose;
- use of the money for the benefit of the lawyer or others;
- intention to return the money;

- good character and fitness; and
- absence of dishonesty, venality or immorality.

In re Fleischer, 102 N.J. 440 (1986):

- poor accounting practice;
- no client suffered a loss;
- prior unblemished disciplinary record; and
- unlikelihood of subsequent misappropriations.

In re Lennan, 102 N.J. 518 (1986):

- severe financial pressures;
- client's subsequent ratification of knowing misappropriation; and
- candor and cooperation with disciplinary authorities.

In re Blumenstyk, 152 N.J. 158 (1997):

- full restitution prior to discovery.

In *Lennan*, the Court met squarely one respondent's argument that the only reason he used client's funds was because of extreme financial pressures. Quoting its original language in *Wilson* seven years earlier, the Court stated:

> An attorney beset by financial problems may steal to save his family, his children, his wife or his home. After the fact, he may conduct so exemplary a life as to prove beyond doubt that he is as well equipped to serve the public as any judge sitting in any court. To disbar despite the circumstances that led to the misappropriation, and despite the possibility that such reformation may occur, is so terribly harsh as to require the most compelling reasons to justify it. As far as we are concerned, the only reason that disbarment might be necessary is that any other result risks something even more important, the continued confidence of the public in the integrity of the Bar and the judiciary. *Id.* at 524.

Perhaps the most difficult of all challenges dealt with the effect of recognized medical disabilities. In companion decisions the Supreme Court virtually struck alcoholism and voluntary

drug addiction from the list of factors that could ever mitigate disbarment in cases of knowing misappropriation. It held that in order to be entitled to consideration for a sanction less than disbarment, a respondent would be required to prove under the M'Naghten test of insanity:

> [T]hat a disease of the mind rendered him unable to tell right from wrong or to understand the nature and quality of his acts. *In re Romano*, 104 N.J. 306, 311 (1986). Accord *In re Hein*, 104 N.J. 297, 303 (1986).

The Court, in *Hein*, went on to explain its rationale:

> We have no doubt that the alcoholism contributed to the loss of critical control of judgment, but cannot conclude that the evidence warrants a departure from the principle that we set forth in *In re Wilson*.
>
> To some extent a similar effect on perception, cognition and character may be caused by financial reverses, especially when that results in extreme hardship to respondent's family. It is not unusual in these cases to find such hardship, at least as perceived by most respondents. Yet we disbar invariably. It is difficult to rationalize a lesser discipline where alcohol is the cause—especially in view of the often related factors of financial reverses, failure in the profession, family hardship, and ultimately misappropriation.
>
> We recognize, as respondent argues, that alcoholism is indeed not a defect in character. The public policy of the State of New Jersey recognizes alcoholism as a disease and an alcoholic as a sick person. See, e.g., *N.J.S.A.* 26:2B-7 (alcoholics "should be afforded a continuum of treatment" rather than subjected to criminal prosecution.) The course that we have pursued in disciplinary matters is premised on the proposition that in our discipline of attorneys our goal is not punishment but protection of the public (citation omitted). *Id.* at 302.

The compulsive gambling defense was eliminated in the case of *In re Nitti*, 110 N.J. 321 (1988) when the Court noted that this respondent had the ability to distinguish right from wrong.

In 1979 the Court in *Wilson* stated that disbarment for knowing misappropriation would be "almost invariable." *In re Wilson*, 81 N.J. 451, 453 (1979). Seven years later, in 1986, the same Court pointed out that "the fact is that since *Wilson* (disbarment) has been invariable." *In re Noonan*, 102 N.J. 157, 160 (1986). That result has not varied down to the present day.

In a 1998 opinion authorized by Chief Justice Deborah T. Poritz in 1998, the Supreme Court reaffirmed the *Wilson* rule in the following language:

> We find that Joel A. Greenberg knowingly caused his firm to disburse monies to him that belonged to the firm without the consent of his law partners and that he knowingly misappropriated fees due the firm to his own use. We reaffirm the rule set forth in *In re Wilson*, 81 N.J. 451, 409 A.2d. 1153 (1979) and extended in *In re Siegel*, 133 N.J. 162, 627 A.2d 156 (1993), that misappropriation of client or law firm funds will almost invariably result in disbarment. We hold that disbarment is warranted in this case.
>
> *In re Greenberg*, 155 N.J. 138, 140 (1998).

In those few cases where the misappropriation is shown to have been grossly negligent, and not knowing, a substantial term suspension has often been imposed. *In re Tompkins*, 155 N.J. 542 (1998); *In re Ewing,* 132 N.J. 206 (1993) (1 year); *In re Konopka*, 126 N.J. 225 (1991) (6 month suspension); *In re Johnson*, 105 N.J. 249 (1987) (indefinite suspension) and *In re Perez*, 104 N.J. 316 (1986) (2 year suspension).

In the context of disciplinary actions arising out of the mishandling of trust funds, strict construction is the general rule. As the Supreme Court has put it:

> For obvious reasons, the strictest rules of conduct apply here and every presumption works against the wrongful user. *In re Banner*, 31 N.J. 24, 28 (1959).

Section 1.2 Financial Implications

In addition to the personal ethical responsibility which every attorney shoulders for fiduciary violations, there are serious financial implications that must be considered. As a fiduciary, every sole practitioner is civilly responsible for failing to preserve trust property.

Partnership law makes all partners jointly and severally liable for any theft or misapplication of funds. *N.J.S.A.* 42:1A-17. Thus, efforts by one partner to "see no evil and hear no evil" in the handling of law firm trust funds will not result in any lessening of the unpleasant financial repercussions that follow from litigation against all partners following a theft. Additionally, traditional agency law makes principals liable for theft by employees. Moreover, other states have applied the same results to shareholders in a professional corporations. As noted in Chapter 8, however, there are prudent steps that lawyers may take to minimize the opportunities for theft from a trust account. The first step, however, is to properly maintain attorney trust and business account records and to conduct full three-way monthly reconciliations (See Section 4.4).

Section 1.3 The Right Course

The best reason for maintaining proper books and records is because it is simply the right thing to do. Proper recordkeeping enables the attorney to exercise full and complete control over funds entrusted by clients to the attorney, including legal fees that are rightfully due the attorney. By maintaining a good double-entry recordkeeping system, the lawyer is in a position to control the account by systematic and regular review in order to detect, not only errors, but also, employee, associate or partner theft where it occurs. By making a proper record of the handling of all transactions, both the attorney and client are protected, since the attorney is prepared to answer any reasonable question or allegation that might be made. In a day when litigation seems more the general rule than the exception, sound defensive lawyering is another good reason to always maintain required trust and business records.

This treatise will educate all attorneys on the principles to be followed in maintaining proper trust and business account records. The more experienced and knowledgeable practitioners may wish to refer directly to the black letter law which is summarized in the following sections:

"Trust Accounting In A Nutshell" — Section 4.0

"Business Accounting In A Nutshell" — Section 6.0

Newer practitioners will benefit from the in-depth treatment developed in each section, which explains not only the prevailing law, but also how to implement it. For the convenience of practitioners, Appendix L contains blank samples of all important trust and business records used in this work.

CHAPTER 2 — KEY CONCEPTS IN ATTORNEY TRUST ACCOUNTING

Section 2.0 Key Concepts are Basic to Understanding Trust Accounting

Many individuals shy away from anything to do with the term "accounting." Most people have visions of balance sheets, with terms like equity, net worth, reserves, depreciation, assets and liabilities. Perhaps even more oblique to non-accountants are terms like debit and credit. These terms require that one look at oneself as a bank which, as a debtor, owes money to numerous creditors, called depositors. Since many of us may not like to conceive of ourselves as debtors (although the analogy is clearly apt), it is no wonder that some professionals have difficulty dealing with these concepts.

Consequently, this book initially discards these concepts and starts fresh with the proverbial **tabula rasa**. The text will build and explain all of the accounting methods and concepts an attorney needs to know to properly maintain trust account records—in English—not accountantese. Moreover, this book will deal with written accounting records using the double-entry bookkeeping model for basic orientation. These principles are easily transferrable to computerized recordkeeping systems, which are now readily available for law firms. The judiciary does not endorse any particular computerized systems.

Before describing the proper methods of recordkeeping, however, there are seven key concepts about trust accounting that must be mastered before trust accounting itself makes sense. With these key concepts in mind, a lawyer cannot fail to understand fiduciary responsibilities.

Section 2.1 Key Concept #1: Separate Clients are Separate Accounts

Individualism is the single most important concept in trust accounting. Client A has nothing whatsoever to do with Client B. Consequently, each client's funds must be looked on as totally separate from those of all other clients, and they must, therefore, be separately maintained. **Never** can you allow one client's funds to be used, even momentarily, to satisfy another client's obligations or, of course, your own. (There is one exception to this rule in real estate matters, which will be dealt with later in Section 4.10 entitled "Uncollected Funds Doctrine.")

Classically, the way to maintain individual identity is to establish totally separate accounts for each client. In the modern business world this is not usually practical, given the volume of funds that pass transitorily through an attorney's trust account as a consequence of handling many different matters for many different clients. To accommodate the needs of modern commerce, *R.* 1:21-6 requires attorneys to establish a general (or common) account, called an "Attorney Trust Account," through which many clients' monies (usually held for short periods of time) will pass. Separation is obtained by maintaining a separate record (called a client ledger) for each individual client. The client ledger, together with the other parts of our mandatory recordkeeping system, is virtually as good as opening a separate account. The lawyer

is able to instantly account for all money received on behalf of each client, as well as all money disbursed for that client's legal matter.

A general (common) Attorney Trust Account can be viewed as a great funnel through which many clients' monies flow via deposits and disbursements. If client ledgers and other required records are properly maintained, the attorney is always able to tell exactly whose monies are in the Attorney Trust Account at any given time. If client ledgers and associated records are not maintained, it is very difficult for the attorney to segregate the various clients' funds. This failure results in a commingling of one client's funds with those of other clients. Then, when monies are needed and the Attorney Trust Account spigot is turned on, the individuality of the funds used is blurred. Money comes out, but it is very difficult for the attorney to know whose money is being used. Later, when questions arise, this difficulty becomes an impossibility. At its worst, this failure may result in negligent or knowing misappropriation of one client's funds and may lead to serious disciplinary action.

As stated above, one client (Client A) generally has nothing to do with another client (Client B), and their funds must be regarded and maintained separately. Thus, if Client B is a corporation composed of three shareholders, one of whom is Client A, funds from Client A's individual account cannot be unilaterally used to offset disbursement from Client B's corporate account, or vice versa. *In re Knox*, 97 N.J. 64 (1984). The same is true if Client A is the sole shareholder in the Client B Corporation. In this case monies can flow properly from Client A to Client B only where Client A authorizes the attorney in advance, in writing, to expend monies presently on hand in Client A's account to the account of Client B. In this case a check is written on the trust account from Client A's funds, to the payee, Client B, and that check is then deposited in the same trust account to the credit of Client B. In this way, the separateness of each individual's or entity's funds is fully maintained, while the transfer of funds from one client to another is fully documented with a complete and proper audit trail.

Section 2.2 Key Concept #2: You Can't Spend What You Don't Have

Accountants analogies notwithstanding, attorneys are not banks. Therefore, they do not have inexhaustible supplies of "available" funds at their disposal. Of course, many attorneys do have on deposit in their attorney trust account, from time to time, large amounts of clients' funds which have cleared the banking process. These funds, however, are not "available" for use by anyone other than the individual client who owns them. This we know from our first Key Concept.

The following example graphically illustrates this concept. Assume a lawyer is holding monies totaling $5,000 for five separate clients as follows:

Andy	$1,000
Barbara	$2,000
Carol	$1,500

Denis	$ 0
Ernie	$ 500
Total	$5,000

If the lawyer writes a check for $1,500 from this trust account for Ernie, $1,000 of that check is going to be paid for by Andy, Barbara and Carol. The lawyer should be holding a total of $4,500 for Andy, Barbara and Carol. However, the lawyer only has $3,500 left after writing the $1,000 check for Ernie. The lawyer simply cannot spend for Ernie more than the lawyer has on deposit to that client's credit.

Section 2.3 Key Concept #3: Timing is Everything

Implicit in Key Concept #2 is the additional issue of timing. Every attorney who signs trust account checks should contact the firm's financial institution and be personally aware of that institution's clearing time for (a) intrastate checks (b) interstate checks and (c) other unusual instruments.

Timing involves knowing precisely when the lawyer is given credit for deposits (or when a deposit is dishonored) and when the account is charged for disbursements. Take the simple example of Client A who brings in $5,000 cash, which the lawyer deposits in an Attorney Trust Account tomorrow at 3:00 p.m. Assume also that at that client's request the attorney issues a check back to her for $500 to pay off a legitimate expense. If the bank closes for business at 2:00 p.m., the cash deposit, although physically made tomorrow, will not be credited to the lawyer's account until the following day even though it is cash, because the deposit was made "after hours!" If Client A, or anyone to whom she negotiates the lawyer's trust account check, drives up to a drive-in window at the lawyer's financial institution at any time before the bank's physical closing time tomorrow (say 4:30 p.m. for the drive-in), an overdraft may be created in the attorney's trust account when that trust check is presented for payment. Of course, as between the financial institution and the lawyer, the depositor, the institution has the right to either honor the check or dishonor it. *N.J.S.A.* 12A:4-401. The bottom line, however, is that, as between the lawyer and her trust account, there is only one place within that account from which money can be taken to honor such a check—from the collected funds of other clients.

If Client A brings in $5,000 in cash and it is deposited and credited to the attorney's trust account today, it can surely be disbursed tomorrow at that client's direction. However, if Client A brings to an attorney a personal check drawn on a New Jersey financial institution, the attorney who deposits that check in the trust account today probably cannot draw against that check tomorrow at the client's request. This is due to the fact that the client's personal check has to clear the banking process before it becomes available to the attorney. For checks drawn on financial institutions within the State of New Jersey, the rule of thumb is to allow one business day after the day of deposit. Where checks are drawn on other out-of-state financial institutions, three days after the day of deposit must usually be allowed. With other specialized checks drawn outside the United States, for example, a greater leeway may be required before one can be reasonably confident that a check drawn on that account has cleared. Attorneys must recognize that this hiatus will almost always exist and that there is almost always a delay of one day or more between the time the lawyer actually makes a deposit at a financial institution and

the time that institution actually collects those monies and gives credit for their receipt. It is not until the latter event that the lawyer can disburse against those funds.

Under *N.J.S.A.* 17:16L-2 *et seq.* every banking institution is required to notify depositors of the general schedule followed by the institution with regard to the availability of funds for withdrawals. While this law applies to accounts used for personal purposes, the schedule will be helpful to guide the attorney. The attorney may then discuss any changes in the availability schedule with the bank personnel so that the attorney has a reliable guide for use with the attorney trust and business account. The normal deposit and collection process is shown in Figure 1.

It is imperative, therefore, to know the availability schedule for the law firm's financial institution. The following explanation from a large financial institution is typical, but each law firm must check with its own institution.

DEPOSITED FUNDS AVAILABILITY

We understand that it is important for you to know the amount of time it takes for any deposit you make to your account to become available for your use. This section explains our availability policy.

DETERMINING THE AVAILABILITY OF YOUR DEPOSIT

We may delay your ability to withdraw deposited funds, depending on the location of the bank on which your deposited check is drawn, and depending on whether the deposit was made at a non-"Our Bank" ATM. The length of the delay is counted in business days from the business day on which you made your deposit. For determining the availability of your deposits, every day is a business day except Saturdays, Sundays, and federal holidays. If you make a deposit before 2:00 p.m. (or when otherwise posted in "Our Bank" offices) on a business day that we are open, we will consider that day to be the day of your deposit. However, if you make a deposit after 2:00 p.m. (or when otherwise posted in "Our Bank" offices), or on a day we are not open, we will consider that the deposit was made on the next business day we are open. Funds availability may differ for deposits made in other "Our Bank" locations. Availability schedules may be obtained upon request.

Same Day Availability

Funds from the following deposits into your account are available on the business day we receive your deposit:

- Funds Transfers
- Electronic Payments, including pre-authorized credits, depending on the time of receipt.

Funds from the following deposits into your account are also available on the business day we receive the deposit for the payment of checks presented, but not for withdrawal:

- Cash
- Checks drawn on "Our Bank" located in NY, NJ, PA, CT and DE - excluding Controlled Disbursement and Payable Through items.

Cash deposits will be available for withdrawal on the first business day after the day of your deposit.

Next Day Availability

Funds from the following deposits into your account are available on the first business day after the business day of deposit:

- Checks drawn on all other "Our Bank" locations, Controlled Disbursement and Payable Through items.
- U.S. Treasury Checks, U.S. Postal Money Orders payable to you and traveler's checks.
- State and local government checks (state(s) in which bank is located only) payable to you. However, you must request next day availability for these items at your local banking office by using a special form provided by the bank. Otherwise, availability for these items is based on whether the check is considered local or non-local.
- Cashier's, certified, and teller's checks payable to you. However, you must request next day availability for these items at your local banking office by using a special form provided by the bank. Otherwise, availability for these items is based on whether the check is considered local or non-local.
- Federal Reserve Bank checks and Federal Home Loan Bank checks if these items are payable to you.
- Up to $2,000 of the funds from the day's deposits of checks are available on the next business day after deposit. This includes $100 of the day's deposit of local and non-local checks.

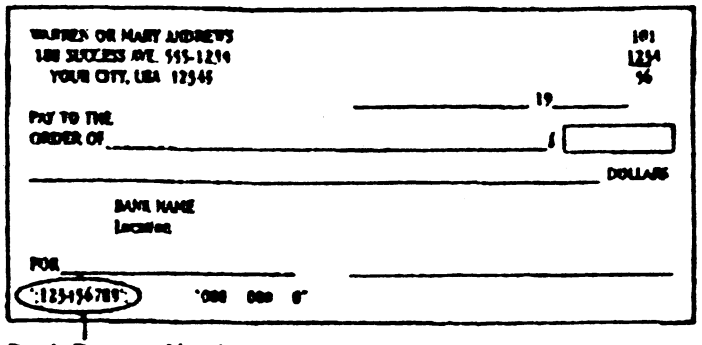
Availability of Other Check Deposits

Your ability to withdraw deposits other than those listed above is generally determined by whether the check is local or non-local. Funds from local checks are available on the second

business day after the business day of deposit. Funds from non-local checks are available on the fifth business day after the business day of deposit.

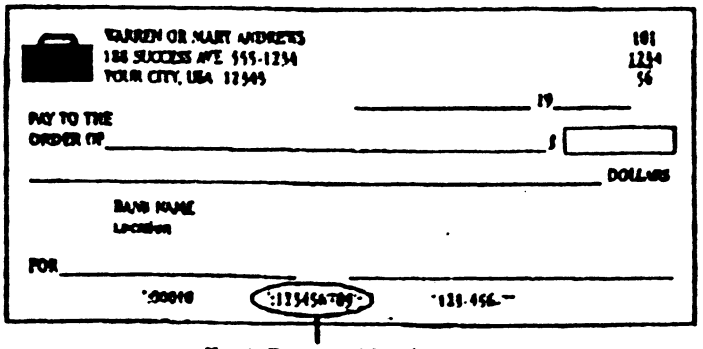
You can determine whether a check you are depositing is local or non-local by determining the location of the branch in which you are making the deposit, and by looking at the bank's location number (routing number) on the check you are depositing. The following check samples show how to identify the bank location number.

Personal Check



Bank Routing Number

Business Check



Bank Routing Number

LOCAL CHECKS

Funds from checks having the following bank location numbers are local checks and may be withdrawn two business days after the business day of deposit:

0210-XXXXX	0310-XXXXX	2219-XXXXX
0212-XXXXX	0311-XXXXX	2260-XXXXX
0214-XXXXX	0312-XXXXX	2310-XXXXX
0219-XXXXX	0313-XXXXX	2311-XXXXX
0260-XXXXX	0319-XXXXX	2312-XXXXX
0270-XXXXX	0360-XXXXX	2313-XXXXX
0280-XXXXX	2212-XXXXX	2319-XXXXX
	2214-XXXXX	2360-XXXXX

(XXXXX denotes a number which can vary.)

NON-LOCAL CHECKS

If the bank location number is not one listed previously, the check is considered a non-local check. Non-local checks are available the fifth business day after the business day of deposit.

AUTOMATED TELLER MACHINE (ATM) TRANSACTIONS

At "Our Bank" ATMs, the business day change is generally at 4 p.m. Transactions made on a non-business day are considered to be made on the next business day.

Deposits made before 2 p.m. at any non-"Our Bank" ATM will be available five business days after the day of deposit.

LONGER DELAYS MAY APPLY

In those infrequent cases where we elect to delay your funds availability for a longer period, a number of factors may influence our decision. These include: our belief that the check being deposited will not be paid; you deposit checks totaling more than $5,000 on any one day; you have overdrawn your account repeatedly in the last six months; you redeposit a check which has been returned to the bank unpaid; or there is an emergency such as an interruption of communications or computer failure, a suspension of payments by another bank, a war, or any emergency condition beyond the control of the bank.

If we do delay the availability of your funds for a longer period, we will notify you and tell you when the funds will be available, delay in availability of up to eleven business days may be possible.

SPECIAL RULES FOR NEW ACCOUNTS

If you are a new customer, the following special rules will apply during the first 30 days your account is open. Funds from deposits of cash, and the first $5,000 of a day's total deposits of U.S. Treasury, cashier's, certified, teller's, traveler's, the state or local government of the state where your account is maintained, Federal Reserve Bank and Federal Home Loan Bank checks, and checks drawn on "Our Bank" will be available on the first business day after the day of your deposit if the deposit meets certain conditions. For example, the checks must be payable to you and deposited into your account and for cashier's, teller's and traveler's checks you must request and use a special form provided by the bank. The excess over $5,000 will be available on the seventh business day after the day of your deposit. Funds from wire transfers into your account will be available on the first business day after the day we receive the transfer. The funds from other check deposits will be available on the seventh business day after the day of your deposit.

CASHED CHECKS

If you cash a check drawn on another bank, we may place a hold on the funds in your account in the amount of the cashed check until the funds are collected by us.

DEPOSITED CHECKS

We will make every effort to collect checks accepted for deposit but reserve the right to accept or reject any check for deposit.

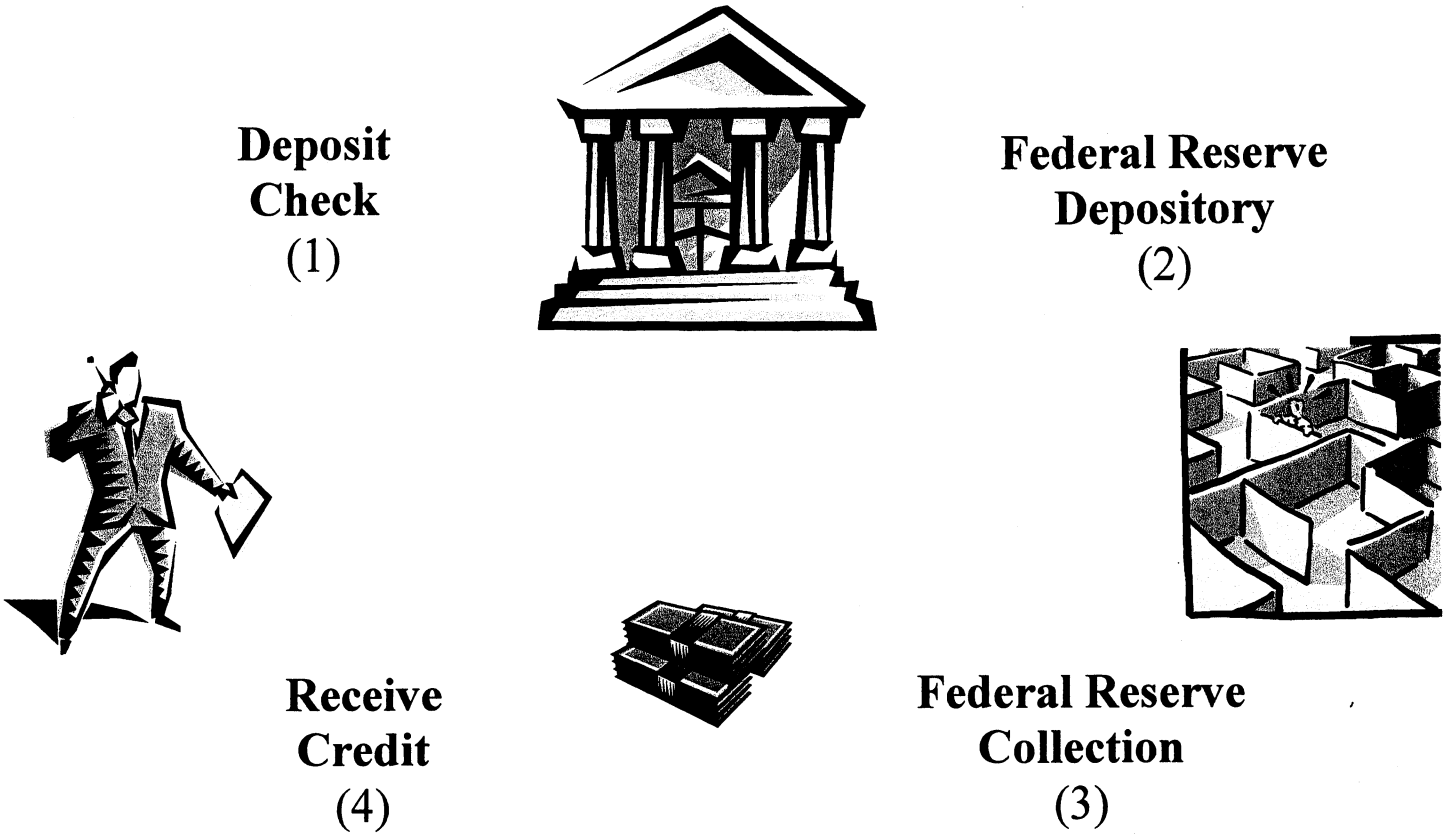
PAYABLE THROUGH DRAFTS

In some instances we will treat checks as local or non-local based upon the location of the bank through which the check is payable, not on the bank location number on the bottom of the check. For example, if a credit union share draft is payable through a credit union that is located in the same check processing region as "Our Bank", but the draft is payable through a bank located outside our check processing area as determined by the bank location number, the share draft will be treated as a local check. If you have any questions about a specific check, please ask a bank representative for assistance.

FOREIGN CHECKS

Checks drawn on banks outside the United States are sent for collection instead of being deposited directly into your account. Any non-US checks deposited will be returned to you via US mail. Please speak with an "Our Bank" representative to assist you in collecting funds from non-US checks and to understand associated collection fees. Funds will be deposited after we receive payment for the check from the bank on which it is drawn.

FIGURE 1 — BANK CLEARING PROCESS



Key Concept #3 also helps to explain the doctrine that prohibits drawing against uncollected funds (See Section 4.10). To paraphrase a famous former major leaguer and New Jersey resident, you don't have money until you have it. The doctrine of uncollected funds sets forth the general rule that the lawyer cannot spend a client's money until the checks clear the banking process and become "collected funds" in the attorney trust account. This is especially true where the lawyer receives an insurance company's sight draft (which, of course, cannot clear until the company actually gets sight of the draft at its home office during the bank collection process and accepts the draft). If the lawyer pays out monies from an Attorney Trust Account at any time before the funds of a particular client clear the banking process and are collected by the lawyer's financial institution and credited to that account, there is one and only one explanation for where the money comes from to honor the attorney trust check payout—from the collected funds of other clients. Consequently, a lawyer must always obey Key Concept #2: Do Not Spend What You Don't Have. This concept is further amplified under Key Concept #6 (Section 2.6) and is graphically shown in Figure 2.

Section 2.4 Key Concept #4: Always Maintain An Audit Trail

The purpose of all recordkeeping requirements and procedures is to help clients know, and attorneys explain, what happened to clients' funds that were entrusted to the attorney's care. Accountability requires that all aspects of the transaction be traceable through an accurate audit trail, from the time of receipt of the fund up to and including, not only disbursement of the funds (usually by check), but proper negotiation of that check by the payee and clearance through the banking process. An audit trail is the series of attorney and bank created records, such as bank statements, deposit slips, cancelled checks, etc., that make it possible to trace what happened to client monies handled by the lawyer. In a normal transaction, where a client gives money to an attorney who then puts that money in the firm's trust account and pays the money out at the direction of the client, the following minimum documents (sometimes referred to as "source documents") will provide the audit trail:

- the initial deposit slip (or a duplicate copy or bank receipt), which should show the date the slip was made up, the amount of the deposit, the name or file number of the client on whose account the money has been received, the source of the funds and the date stamp showing the day the deposit was actually received by the bank;

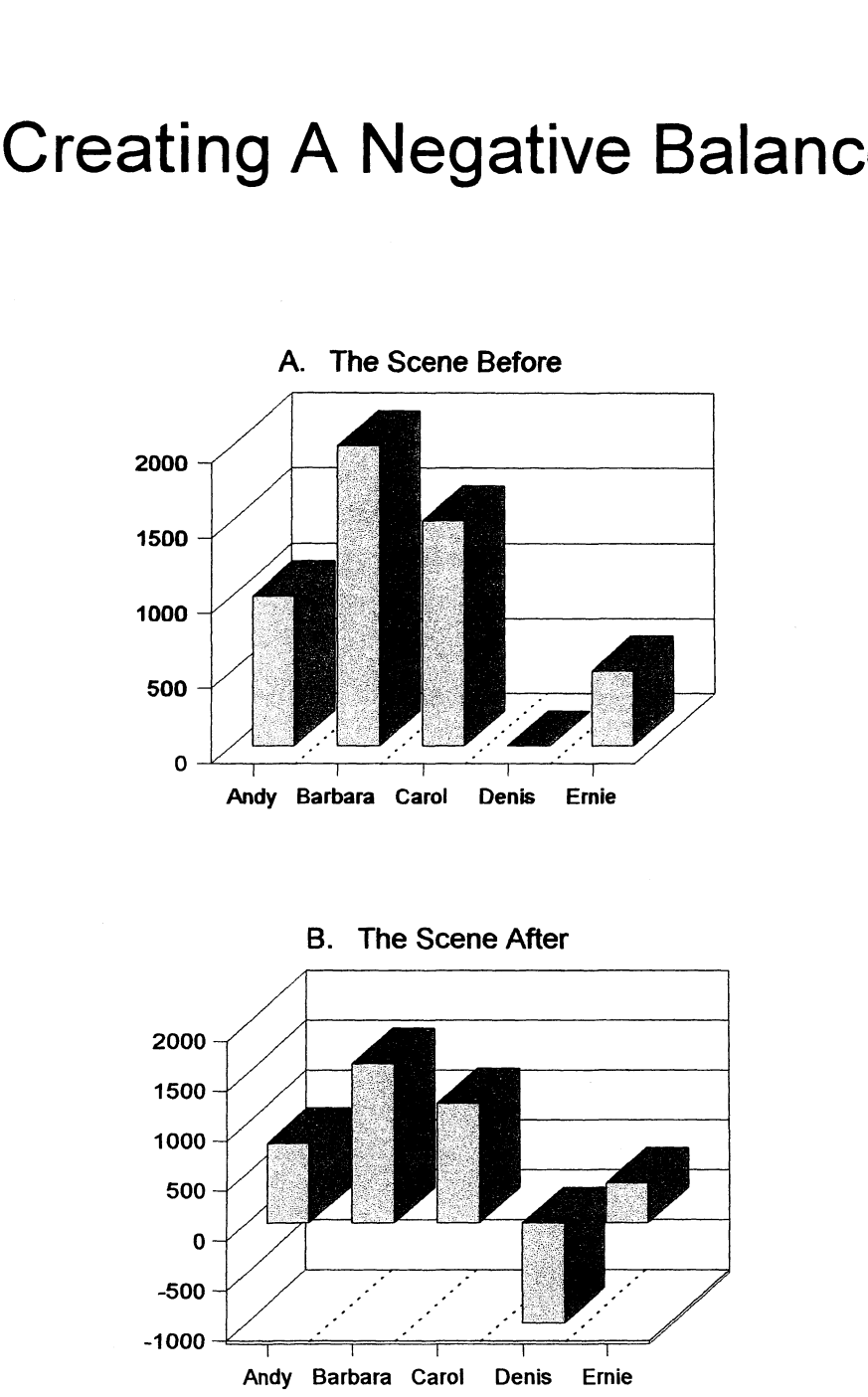
- the bank statement, which will show when the deposit was actually credited;

- the checkbook stub, which will show when disbursements were made and to whom, as well as the amount;

- the disbursement vehicle (a check or electronic funds document) which will show the date it was drawn, the amount, the name of the payee, the purpose of the check (or notation of the matter it pertains to), the order of negotiation (from the endorsement) and the date deposited for collection; and

- the bank statement, which will show the date the trust account was actually charged for the check.

FIGURE 2 — CREATING A NEGATIVE BALANCE



Other required records under *R.*1:21-6, such as receipts and disbursements books, will be discussed later. They are not necessary "source documents," but they are an integral link in a complete audit trail.

The key to providing a proper audit trail is descriptiveness. If, for example, five checks aggregating $100,000, but involving three separate clients, are deposited into an attorney's trust account via one deposit slip, it will be difficult to tell whose monies are being deposited if the slip simply reads "$100,000". The deposit slip would be descriptive if it listed each of the checks comprising the $100,000 deposit as follows:

CLIENT	BANK IDENTIFICATION CODE	AMOUNT
MATTHEW	50-1 220	$ 15,000
ARN	3-1 310	$ 50,000
ARN	60-8 310	$ 30,000
ZUCHS	50-10 220	$ 5,000
		$100,000

Such descriptiveness allows anyone to accurately match these amounts up with the bank statement and conclude that Mr. & Mrs. Arn deposited a total of $80,000 with the attorney, which was credited by the bank to the attorney's trust account on a certain date. *R.*1:21-6(c)(1)(A) specifically requires that trust receipts be deposited "intact" and that the "duplicate deposit slip shall be sufficiently detailed to identify each item." Similarly, with checks written for disbursement from the trust account, each check must indicate on its face the client (by name or file number) so that there is a "tie-in" between that check and the particular client matter. *R.*1:21-6(c)(1)(G). Ask yourself, how can I show that these particular monies (either being received or disbursed) belong to a particular client? If a client has more than one case with the attorney, it will be important to describe the particular matter to which the deposit or disbursement is attributable. Finally, never make a client trust check out to cash. Not only does this eliminate the audit trail, but it is specifically proscribed by *R.*1:21-6(c)(1)(A).

Section 2.5 Key Concept #5: Trust Accounting Is Zero Based Accounting

A main goal of all trust accounting is to balance out the account. What comes in for one client must equal what goes out for that client; no more, no less. Therefore, one goal of good trust accounting is to "zero-out" each client's ledger account as soon as reasonably possible.

Since client's funds are usually deposited in an Attorney Trust Account only for short periods of time to accomplish a specific objective, proper trust fund management requires that each client matter be reviewed periodically (usually monthly) with a view toward properly removing all balances and zeroing-out clients' accounts.

Sometimes a small residue of funds remains in the account due to design or mathematical error. Balances may exist because the attorney has neglected to promptly take the entire earned legal fee or because a check is outstanding and has not cleared. Whatever the reason, small inactive balances are undesirable and each one should be periodically reviewed and promptly resolved.

It is important to keep a running balance of both the entire trust account (the general running balance) and each client's individual account (the individual running balance). Small inactive balances on individual client matters are a hindrance to the balancing process.

Section 2.6 Key Concept #6: There Is No Such Thing As A "Negative Balance"

In trust accounting, there is no such thing as a negative balance. All balances must either be positive (while monies are being held for clients) or zero (when the matter is closed and no monies remain in the trust account). Unless caused by a mathematical or bank error and promptly corrected, a single negative balance means the lawyer has knowingly or negligently misappropriated clients' funds, either for the lawyer's own benefit or for the benefit of another client.

This concept is graphically illustrated in Figure 2. Assume that an attorney is holding a total of $5,000 for four clients as follows:

Andy	$1,000
Barbara	$2,000
Carol	$1,500
Denis	$ 0
Ernie	$ 500
Total	$5,000

If the attorney expends $1,000 from the trust account for Denis, either before any funds from that client are received or, if received, then before they are collected by the attorney's financial institution and credited to the trust account, the source of those funds obviously cannot be Denis. The source has to be the monies of Andy, Barbara, Carol and Ernie. Their trust funds are reduced **pro rata**. Thus, after this misappropriation, Andy has only $800, Barbara only $1,600, Carol only $1,200 and Ernie only $400. This is conclusively proven by observing that, although the attorney still owes Andy, Barbara, Carol and Ernie $5,000, the attorney now has only $4,000 left in the trust account. It is sometimes said (through circuitous reasoning) that you can account for all funds by adding in the "negative balance." This is like saying the lawyer is not

out of trust if you do not consider the negative amount representing monies spent for Denis. The answer is simple: there is no such thing as a "negative balance!"

Section 2.7 Key Concept #7: You Can't Play The Games Unless You Know The Score

It is virtually impossible to plan sound baseball strategy to win a game if you do not keep track of the score. What you do in the ninth inning to win the game with one man out and the bases loaded depends considerably on whether you are behind by one run or down by nine runs. Trust accounting works the same way. Here you keep score by maintaining a running balance.

There are two specific running balances that are kept: (1) an *individual* running balance for each individual client, on that client's ledger, and (2) a *general* running balance for the entire trust account, on the checkbook stub. The running balanced maintained for each individual client ledger tells you how much money you have remaining on hand to use for that particular client. *In re Rabb*, 73 N.J. 272, 276 (1977). The individual running balance for the client is shown on the client ledger (Figure 10) and is computed each time a check is written by subtracting the total of all checks from all deposits standing to the credit of the client. Similarly, each time a deposit is made, that amount is added in and a new running balance created. This individual client ledger running balance serves as a double check against writing a check for more than the particular client has standing to his or her credit.

Additionally, a general running balance for the entire attorney trust account must be maintained "at all times." *In re Banner*, 31 N.J. 24, 28 (1959). *R.*1:21-6(c)(1)(G) requires attorneys to maintain running balances. This is usually done on the checkbook stub. This general running balance serves as a double check against writing a check for more that the attorney has in the overall trust account. Both the general and individual running balances must always be checked before any trust account check is actually written and delivered. If this is done (absent a mathematical or banking error and assuming all other Key Concepts are followed), it will be virtually impossible to overdraw your account.

CHAPTER 3 — CREATING CLIENTS' TRUST ACCOUNTS

Section 3.0 Who Must Maintain Attorney Trust Accounts

"**Every** attorney who practices (privately) in this state" shall maintain in a financial institution in New Jersey . . . a trust account or accounts . . ." (Emphasis added). *R.*1:21-6(a). *See also R.*1:28A-2. These bank accounts are required as a condition precedent to the right to engage in the private practice of law in this state. *R.*1:21-6(a).

No distinction is made based upon frequency of New Jersey practice, so that those who practice full time are not required to keep more detailed records than part-time or occasional practitioners. The Supreme Court has held that even though trust funds are received only a few times a year, a trust account must be maintained and all trust money deposited into that account. *In re White*, 24 N.J. 522, 525 (1959) (Construing former Cannon 11 of the Canons of Professional Ethics). The Court has also held that *R.*1:21-6 accounts had to be maintained by a Pennsylvania lawyer who had a very "limited" private practice in New Jersey and who asserted that in fact no trust funds ever came into his hands. *In re Jaffe*, 74 N.J. 86, 89-90 (1977). Thus, it is clear that all attorneys—full-time, part-time or occasional—must maintain the same minimum bank accounts and records specified in *R.*1:21-6. The only difference among practitioners will be the amount of work necessary to maintain those records, which will naturally be a function of the volume and the sophistication of the legal business conducted by each.

A special note is in order for the truly "occasional" practitioner which is defined in the Annual Attorney Registration Statement as one who practices New Jersey law for less than five percent of the time. These are often attorneys who are semi-retired, staff to business corporations or insurance companies and the like. While they generally do not practice New Jersey law privately, they "occasionally" are called upon to draft a will for a New Jersey relative, create a non-profit corporation for a church group, or represent a friend in municipal court or at a real estate closing. Each of these acts constitutes the private practice of New Jersey law; therefore, unless the attorney appears as assigned *pro bono* counsel under court order, *R.*1:21-6 mandates that accounts must be maintained. That rule, however, requires only that both a trust and business account be maintained. Unless trust funds are held or legal fees received, however, the accounts need not be used; nor do they have to be checking accounts. For the "occasional" practitioner to comply with the rule, it is suggested that savings or other accounts titled "Attorney Trust Account" be used with a minimum deposit of personal funds (e.g., $100) to keep the accounts open and to minimize or avoid service charges. Some financial institutions impose no monthly service charge for savings or other similar accounts; however, other institutions impose a minimal monthly charge. Naturally, should trust monies be held or legal fees received, it will probably be necessary at that time to open traditional trust and business checking accounts.

The Supreme Court has made clear that attorneys and law firms that have out-of-state offices must maintain trust and business accounts in order to practice New Jersey law. The Court first spoke to this issue in 1977 in the case of *In re Jaffe,* 74 N.J. 86 a Pennsylvania lawyer who had a "very limited" private New Jersey practice. *See also In re White*, 24 N.J. 522 (1959).

Section 3.1 Location Of Trust Accounts

All general attorney trust accounts must be maintained only "in a financial institution in New Jersey". RPC 1.15(a) and *R.*1:21-6(a). Thus, no trust funds which are required to be deposited in *R.*1:21-6 and *R.*1:28A accounts can be maintained in another state.

Subparagraph (f) of *R.*1:21-6 spells out the applicability of this rule to out-of-state lawyers and law firms practicing in this State:

> Attorneys Practicing With Foreign Attorneys or Firms
>
> All of the requirements of this rule shall be applicable to every attorney rendering legal services in this state regardless whether affiliated with or otherwise related in any way to an attorney, partnership, legal corporation, limited liability company, or limited liability partnership formed or registered in another state.

In a case of first impression nationwide, the Supreme Court imposed disciplinary responsibility on the national law firm of Jacoby & Meyers for violation of subparagraph (f). That law firm operated several South Jersey branch offices, but failed to process clients' trust funds received in connection with New Jersey legal matters through a New Jersey trust account. Instead, all funds went into the firm's Pennsylvania trust account. As a consequence, the law firm was reprimanded and assessed disciplinary costs. *In re Jacoby & Meyers,* 147 N.J. 374 (1997).

In 2008, the Supreme Court's Professional Responsibility Rules Committee considered a request to allow trust accounts to be held in other states in view of "the removal of the in-state requirement from the bona-fide office rule (*R.*1:21-1(a))." The Committee rejected the request and pointed out that the in-state requirement "served to protect the public." It stated that such a change "would impede disciplinary authorities' ability to oversee the proper maintenance of trust funds; and with no subpoena power, disciplinary authorities would be unable to secure essential records or freeze assets in emergent situation." 191 N.J.L.J. 578-607 (2008).

The obligation for maintaining proper trust accounts and records is the personal responsibility of each attorney admitted. *In re Rabb*, 73 N.J. 272, 277 (1977). One attorney

cannot avoid disciplinary action based upon the assertion (even if bona fide) that it was a partner who had total responsibility and control over the records. *In re Shamy and Pincus*, 59 N.J. 321 (1971); Also *In re Carmichael*, unreported (2002).

In this regard, all partners and shareholders have an equal responsibility to keep trust (and business records) in the event of dissolution of a partnership or a professional corporation. *R.* 1:21-6(e) provides that they "shall make appropriate arrangements for the maintenance by one of them or by a successor firm of the (required) records . . . ." It is best for all concerned to memorialize any such arrangements in writing.

Section 3.2 Approved Depositories For Trust Funds

Only New Jersey "financial institutions" are authorized to hold attorney trust funds. That term includes banks, savings and loan associations, credit unions and savings banks. It does not encompass non-bank money market funds. *Advisory Opinion 574*, 116 N.J.L.J. 353 (September 12, 1985). All financial institutions must also be governmentally insured. *R.* 1:28A-2(a)(1) (See Section 4.8).

In order to qualify to hold attorney trust funds, New Jersey financial institutions must be approved by the Supreme Court. Approval is automatic provided the financial institution files an agreement with the Supreme Court "to report to the Office of Attorney Ethics in the event any properly payable attorney trust instrument is presented against insufficient funds," to "cooperate with the IOLTA Program" and to "cooperate fully with the Office of Attorney Ethics." *R.* 1:21-6(b). A list of approved financial institutions is set forth in Appendix G and is published annually in the New Jersey Law Journal and New Jersey Lawyer. The list is also available on the Office of Attorney Ethics website (www.judiciary.state.nj.us/oae/index.htm). Attorneys who have questions as to whether a particular financial institution not appearing on the list has in fact filed an agreement with the Court may call the Office of Attorney Ethics at (609) 530-4008.

Section 3.3 Attorney Trust Account Defined

Sometimes referred to as a general or common trust account, all attorneys must have at least one general Attorney Trust Account (almost always an IOLTA Attorney Trust Account), where client's funds are held pending resolution of clients' matters. Usually, funds held in the IOLTA Attorney Trust Account are retained for a short term, and no interest is generated for the benefit of the client. Where the amount of funds to be held is large, or where the period for which they are to be held is long, prudence may dictate that consideration be given to establishing a separate interest-bearing trust account for the benefit of the client. (See also Section 4.8).

Multiple attorney trust accounts may be created. Neither *R.* 1:21-6 nor *R.* 1:28A restricts the number of trust accounts an attorney may maintain, so long as they comply with the

recordkeeping requirements. The easiest way to account for multiple attorney trust accounts (and to comply with *R.*1:21-6 recordkeeping) is to establish a separate section in the attorney's Client Trust Ledger Book (Section 4.1D) to keep track in a single centralized location of all trust funds entrusted to the attorney's care. Client trust ledgers (Figure 10) for separate trust accounts should ideally be of a different color so as to easily distinguish them from those ledgers belonging to the general Attorney Trust Account. The separately colored client ledgers will serve as a memorandum that the attorney is accountable for these separately maintained trust funds. Naturally, all receipts and disbursements should be shown on the colored client ledger sheet, so that there is a complete audit trail for the funds. Once the separately colored client ledger is created, the client or third party check or instrument may be deposited directly into the separately-created trust account. There is no need to run such funds through the general attorney trust account in the first instance.

It must be remembered that for funds to be subject to *R.*1:21-6 and deposited in the trust account, there must be an attorney-client relationship. Thus, where an attorney sets up a bank account for his or her children or spouse, these are not covered by *R.*1:21-6, since the lawyer is usually not acting in a legal capacity for clients. Consequently, these funds must not be deposited in the attorney trust account.

Specifically exempted from the operation of *R.*1:21-6 are fiduciary accounts that the attorney may maintain as "executor, guardian, trustee, or receiver, or in any other similar fiduciary capacity". *R.*1:21-6(a). Responsibility for these fiduciary accounts is governed by case law and, in some instances, statutes. However, it is safe to assume that keeping detailed *R.*1:21-6 records for these fiduciary accounts will go far toward meeting those recordkeeping responsibilities. Other "similar" fiduciary accounts would be those set up in writing appointing the attorney as a fiduciary. Examples would be a written Power of Attorney, where the lawyer acts as Attorney-In-Fact, written *inter vivos* trusts, or where the attorney acts as Trustee, and written Custodial Bank Accounts, or where the attorney is Custodian-In-Fact. Eliminating the above types of specified fiduciary accounts, we can define all other trust accounts where an attorney holds money on behalf of clients in a legal representative capacity as attorney trust accounts. All such trust funds coming into the lawyers control must be deposited into a New Jersey attorney trust account.

Section 3.4 IOLTA Accounts

All attorneys who engage in the private practice of law in New Jersey must register their trust accounts with the IOLTA Fund when they are initially opened and, thereafter, on an annual basis. Failure to register trust accounts with the Fund will result in the attorney being declared ineligible to practice law by the Supreme Court of New Jersey.

In New Jersey, IOLTA is the acronym for Income on Non-Interest Bearing Lawyer Trust Accounts. Generally, unless they are exempt, all attorneys must maintain at least one IOLTA Attorney Trust Account (*R.*1:28A-Appendix C) into which all clients' trust monies should be

deposited, unless they are large enough in amount or are being held for sufficient time to justify placement in a separate interest bearing account for the benefit of the client. The only exemptions from the IOLTA requirements are:

- LOW BALANCE ACCOUNTS — defined as those accounts having an average balance below an amount to be established by IOLTA. At most banks this amount has been set at $5,000.

- HARDSHIP CASES — defined as those created by geographical or other unusual or extreme circumstances which make it unreasonable to comply with IOLTA as determined by the IOLTA Board of Trustees.

The low balance account exemption is selected by the attorney on the IOLTA registration form. Any other exemption requests must be made annually in writing and directed to:

IOLTA Fund of the Bar of New Jersey
New Jersey Law Center
One Constitution Square
New Brunswick, New Jersey 08901-1520
732-247-8222

Attorney participation in New Jersey's IOLTA program is mandatory. Very often, the amount of money that a lawyer handles for a single client is either nominal in amount or to be held for only a short time, or multiple parties or clients pool advance payments against the costs of litigation in a single fund. It would not be feasible for attorneys to establish separate interest-bearing accounts for such clients, as the cost of administering these accounts, including the lawyer's time and the bank charges, would be greater than the amount of interest that would be generated. *R.* 1:28A-2(a)(2). The program adopted by the New Jersey Supreme Court permits these client deposits to be pooled in common trust accounts and the income forwarded directly by the financial institution to the IOLTA Fund without any direct involvement by the attorney once the IOLTA trust account has been established.

The IOLTA Fund was created by Supreme Court *R.* 1:28A, and operates under the auspices of the Court, with an independent Board of Trustees. Day-to-day management of the IOLTA program is handled by a small administrative staff reporting to the Board of Trustees. Pursuant to the court rule, after meeting expenses, at least 75% of the money goes to Legal Services of New Jersey in order to provide representation for low-income people in civil cases. Another 12.5% goes to the New Jersey Bar Foundation for activities within the parameters of the Rule. The remaining funds are available for discretionary grants for legal assistance to the disadvantaged and for other public interest legal activities within the parameters of the Rule. The funds can be used for no other purposes.

The lawyer retains the right to determine in any specific case whether to place client funds in a separate interest-bearing account for the benefit of the client (See Section 4.8) or not to earn interest, in which case the funds must be deposited in the IOLTA Attorney Trust Account. As a guideline, the Supreme Court has indicated that if less than $150 in interest is expected, the funds may be placed in an IOLTA account. Many attorneys incorrectly interpret this $150 as the exclusive litmus test for appropriateness of deposit in an IOLTA account. This guide is intended as an aid to attorneys when no other indication specified in *R.* 1:28A-2(b) is available as to what to do with potential trust account interest. It is not intended as the exclusive litmus test. Ultimately the propriety of deposits into IOLTA is a matter for the attorney's professional judgement, based upon all factors. Income for the IOLTA Program is generated only on those funds that would not have been substantial enough or held long enough to produce interest in excess of bank charges and administrative costs.

Financial institutions are not required to participate in IOLTA. If an institution chooses not to participate, then attorneys who have attorney trust accounts at that financial institution will have to transfer those accounts to institutions that do participate in the IOLTA Program, since the financial institution will not be approved by the Supreme Court as a qualified depository for trust funds (Section 3.2). Virtually every community has a financial institution which offers IOLTA accounts.

There are no tax consequences for the client or attorney as a result of IOLTA participation. New Jersey has an Internal Revenue Service ruling that interest earned on IOLTA trust accounts and remitted by a bank to the IOLTA Fund is not taxable to the client or to the attorney. The attorney is not required to prepare and file IRS 1099 forms, and neither the client nor the attorney is named as a recipient on any 1099 form. The ruling provides that the IOLTA Fund is exempt from federal income tax.

Normal bank service charges are paid from the interest earned by the IOLTA accounts. Check printing charges, wire transfer fees, bank checks or certified checks, account analysis or cash management fees, and overdraft costs are not considered normal service charges and are not paid by IOLTA. Section 4.7 provides information about how to handle bank service charges related to trust account activity.

Low Balance accounts, which remain non-interest bearing, may be subject to bank service charges. Since there is no interest to offset the normal service charges, attorneys must make arrangements to have the bank charge another account or to keep a small amount of personal funds on deposit, as authorized by the Supreme Court. See Section 4.7, "Handling Bank Charges," for more information about these two methods of providing for bank fees.

There are three ways that an attorney or law firm can comply with IOLTA requirements: (1) open a new non-interesting bearing attorney trust account and register it; (2) notify IOLTA that an existing non-interest bearing trust account should now be converted to IOLTA; and (3) annually register all attorney trust accounts, including escrow and master account numbers.

The first occurs when the lawyer or firm opens a new trust account during the year. The lawyer should establish a regular non-interest bearing attorney trust account at an approved financial institution. The lawyer should immediately thereafter call the IOLTA Fund to obtain the appropriate registration forms. If appropriate, a Participation Form (Appendix D) will be provided for the lawyer so that the account can be converted to interest-bearing IOLTA status. Usually, trust accounts of new sole practitioners (and almost always those of part-time and occasional practitioners) fall into IOLTA's "Low Balance" category. This means that the balance and activity in the account are low, and the accounts could cost the IOLTA Fund more in service charges than would be generated in interest. Therefore, these accounts are not converted to interest bearing IOLTA accounts. Rather, the lawyer, having met his/her obligations by registering with IOLTA, will be designated as a Low Balance IOLTA participant until circumstances change.

The second case is when an existing non-interesting bearing trust account should be converted to an IOLTA account. If the average monthly balance has consistently exceed $5,000, the current Low Balance exemption amount, then the lawyer or law firm should call the IOLTA Fund staff and determine whether conversion is appropriate. If so, the Fund will supply the necessary forms and communicate directly with the financial institution to convert the account to interest-bearing IOLTA status. If not, the lawyer will remain as a Low Balance IOLTA participant.

The third situation involves the annual registration of all trust accounts with IOLTA. This process is accomplished with the Fund's mailing of Annual IOLTA Registration Forms (Appendix E). These forms are often completed by the law firm's administrator or managing partner or shareholder. However, every lawyer is required to insure that their accounts are properly registered with the Fund every year even if the account information has not changed.

IOLTA Fund staff are ready to answer any questions or do anything else they can to insure that lawyer compliance with IOLTA requirements is as smooth as possible. They can be reached at (732) 247-8222 or info@ioltanj.org. Many questions may be answered by visiting the IOLTA website of www.ioltanj.org.

Section 3.5 Account Names

Trust accounts must be established only in the name of an attorney or law firm. *R.*1:21-6(a) and *R.*1:28A-2. Actually, there are four choices depending upon the nature of the attorney's employment. The attorney trust account must be established in the name of:

(a) the lawyer;

(b) a partnership of attorneys;

(c) a professional corporation of which the lawyer is a member; or

(d) the attorney or partnership of attorneys by whom employed.

Whichever name is used, the designation "Attorney Trust Account" must also appear in the title of the account. (See Section 3.7). This requirement underlines the personal obligation of the attorney to control client's funds. In the case of IOLTA accounts, the title appearing on the bank statement will be "IOLTA Attorney Trust Account." IOLTA Guidelines for Financial Institutions (page 11) advise that the word "IOLTA" should not appear on the firm's checks or deposit slips.

Section 3.6 Proper Signatories

Signing trust account checks is a personal, non-delegable duty that can only be performed by a New Jersey attorney. *In re Stransky,* 128 N.J. 542 (1992). Although it is entirely proper for a bookkeeper or legal secretary to draft or prepare a trust check at an attorney's direction, it is improper for a non-lawyer to be an authorized signatory on a trust account. *R.*1:21-6(c)(1)(A). See also *In re Carrigan*, 80 N.J. 610 (1979) (where the attorney was disciplined, *inter alia*, for maintaining trust accounts jointly with a non-lawyer and for using checks bearing both of their names. Moreover, prudent fiduciary responsibility indicates that a rubber signature stamp should not be used.

Section 3.7 Required Account And Document Designations

In order to facilitate the immediate and unambiguous identification of clients' trust funds, all attorney trust accounts must be "prominently designated" as an "ATTORNEY TRUST ACCOUNT". *R.*1:21-6(a). Likewise, source documents, such as checks and deposit slips, must also bear the identical designation. This rule applies to regular checks, starter checks and counter checks, the latter to be used in an emergency when an attorney temporarily runs out of regular checks. The rule also requires that the signature card and the title of the account have the same designation. (See Section 3.5). With respect to checks and deposits, the operative words in the rule are "prominently designated." The words "Attorney Trust Account" can be either printed, pre-printed, stamped or typed. Likewise, the words need not appear at any specific location so long as they are "prominent."

Where an attorney finds it necessary or appropriate to establish a separate specific attorney trust account, in addition to a general attorney trust account, the words "Attorney Trust Account" must still appear on the separate account. For example, where representation of a large collection client dictates that a separate trust account be set up (see Section 4.13) the following designation arrangement might be used:

John A. Lawyer,
Attorney Trust Account
Sears, Roebuck — Collections

In connection with establishing separate interest bearing accounts, for example, to hold $50,000 for three months under a real estate contract, one large national bank advises that producing Form 1099's at the end of the year requires that the client's name be listed first, thusly:

Richard Roe, Client John A. Lawyer, Esq. Attorney Trust Account	or	Richard Roe, Client Attorney Trust Account of John A. Lawyer, Esq.

The purpose of this suggestion is to insure that interest is properly reported as taxable income to the client, and not the attorney. Both of these examples would comply with *R.*1:21-6. Additionally, when establishing the account, it is critical to report the client's tax identification number to be sure that the interest earned is taxed directly to the client. Where the interest is to be split between buyer and seller, two accounts should be opened in the name of each party with their respective social security numbers. This will insure that each party will only pay tax on the interest attributable to each.

According to IOLTA Guidelines, only the title of the account will be "IOLTA" Attorney Trust Account". The word "IOLTA" should not appear on checks, deposit slips or other source documents.

Section 3.8 Responsibility For Establishing and Maintaining Proper Trust Accounts

An attorney's fiduciary responsibilities are personal, non-delegable duties. As the Court noted in *In re Rabb*:

> The responsibilities imposed by the disciplinary rules to maintain books and records of clients' funds are personal to each practicing attorney. 73 N.J. 272, 277 (1977).

This obligation requires under RPC 5.1 that "Every law firm . . . shall make reasonable efforts to ensure that member lawyers . . . undertake measures giving reasonable assurance that all lawyers conform to the "Rules of Professional Conduct". The obligation, with respect to proper fiduciary responsibilities, requires that every law firm maintain *R.*1:21-6 records and that all personnel are trained in the requirements of *R.*1:21-6 and RPC 1.15. Furthermore, the obligation requires that those exercising fiduciary responsibilities be adequately supervised in accordance with RPC 5.1, 5.2 and 5.3 to insure compliance. However, while others may be employed to assist in fulfilling fiduciary obligations, it is the lawyer and law firm alone that bears ultimate ethical responsibility.

The Supreme Court has refused to allow one partner to disclaim ethical responsibility simply because another partner was in charge of the firm's books and records. This was the holding in *In re Shamy and Pincus*, 59 N.J. 321 (1971), where Shamy maintained the firm's books and records exclusively. The Court stated that, although Pincus expressed complete confidence in Shamy's integrity, and in fact had no knowledge of any recordkeeping inadequacies until the subject proceeding, he should nevertheless be reprimanded for "passive negligence [that] was a contributory cause for the firm's failure to maintain proper records." *Id.* at 324. Also, *In re Carmichael*, unreported (2002).

The Supreme Court has dismissed attempts to cast responsibility for compliance with a lawyer's recordkeeping responsibilities on non-lawyers. In the case of *In re Barker*, 115 N.J. 30 (1989), the Court reprimanded an attorney for totally failing to exercise any reasonable supervision over his bookkeeper with the result that clients' funds were adversely impacted. There the Court pointed out specifically that:

> An attorney cannot avoid this responsibility by claiming reliance on his or her staff. Respondent totally failed to exercise any reasonable supervision over his part-time bookkeeper. 115 N.J. 30, 36.

Similarly, in the case of *In re Stern and Weiss*, 118 N.J. 592 (1990), the Court held these two partners to have been grossly negligent in supervising an accountant whom they hired to review their trust records. Since clients' funds were invaded to the extent of $40,000, both attorneys were suspended from the practice of law for a period of six months. In the case of *In re Stransky*, 128 N.J. 542 (1992), an attorney was suspended from practice for 2 years for abandoning all control over his trust and business accounts to his secretary-wife, who then misappropriated $32,000 in clients' trust funds. More recently, in the matter of *In re Fusco,* 142 N.J. 636 (1995) an attorney was reprimanded when an associate attorney misappropriated clients' trust funds.

CHAPTER 4 — ACCOUNTING FOR CLIENTS' TRUST FUNDS

Section 4.0 Trust Accounting In A Nutshell

Following is a brief synopsis of the black letter law of attorney trust accounting. Each item is dealt with in depth in the individual sections indicated.

I. Who Must Maintain A Trust Account (Section 3.0)

Every attorney who practices New Jersey law privately in this state, whether full-time, part-time or occasionally, must maintain an attorney trust account. This requirement applies equally to out-of-state lawyers or law firms that are properly authorized to practice in New Jersey.

II. Location Of Trust Accounts (Sections 3.1 and 3.2)

Attorney trust accounts may be maintained **only in New Jersey** and only in financial institutions (i.e., banks, savings and loan associations, credit unions and savings banks) that have qualified with and approved by the Supreme Court as depositories for attorney trust funds.

III. IOLTA Accounts (Section 3.4)

All attorneys who practice New Jersey law privately must maintain at least one IOLTA Attorney Trust Account, absent exemption granted by the IOLTA Board of Trustees.

IV. Account Names (Section 3.5)

Trust accounts must be established in the name of (a) the lawyer, (b) a partnership of attorneys, (c) a professional corporation of which the lawyer is a member, or (d) the attorney or partnership of attorneys by whom the lawyer is employed.

V. Proper Signatories (Section 3.6)

Signing trust account checks is a personal, non-delegable duty that can only be performed by a New Jersey attorney.

VI. Required Designations (Section 3.7)

All attorney trust accounts, as well as all deposit slips and checks, must be prominently designated "Attorney Trust Account."

VII. Responsibility for Trust Accounts (Section 3.8)

Each lawyer individually, as well as every law firm, has ultimate responsibility for the establishment and management of trust funds. This includes the duties of training and supervising non-lawyer personnel.

VIII. The Mechanics of Trust Accounting (Section 4.1)

Proper trust accounting requires familiarity with the following four items:

A. Trust Checkbook

While not a source document, the trust checkbook must be accurately maintained. All checkbooks, check stubs, prenumbered, canceled checks, duplicate deposit slips and bank statements must be retained. A general running balance of the checkbook must always be maintained and up to date.

B. Trust Receipts Book

An appropriate receipts book must be maintained showing the record of all deposits to the trust account, specifically identifying the date, source and description of each item deposited.

C. Trust Disbursements Book

An appropriate disbursements book must be kept showing the record of all withdrawals from the trust account, specifically identifying the date, payee and purpose of each disbursement.

D. Client Trust Ledger Book

An appropriate ledger book must be maintained, having at least one single page for each separate trust client. Each separate ledger sheet must reflect (1) the source of funds deposited, (2) the name of all persons for whom funds are held, (3) the amount of such funds, (4) the description and amounts of all charges from such accounts, (5) the description and amounts of all withdrawals from such accounts and (6) the names of all persons to whom funds were disbursed.

IX. What Must And Must Not Go Into An Attorney Trust Account (Section 4.2)

A. Mandatory Receipts

(1) All funds belonging to the client and "entrusted to (the lawyer's) care" by clients when the attorney is acting as a legal representative.

(2) All funds in which both the attorney and the client claim an interest arising out of the course of the legal representation.

(3) All funds in which both the client and a third person have an interest that come into the attorney's possession during representation of the client.

(4) General retainers for legal services, but **only** where there is an explicit understanding with the client that the retainer will be separately maintained.

B. Permissive Receipts

(1) General retainers for legal services, where no explicit understanding has been reached with clients that they will be separately maintained.

(2) Advances for costs.

(3) Funds of the lawyer that are reasonably sufficient to pay bank charges.

C. Prohibited Receipts

(1) Funds coming into the attorney's hands while acting as an executor, guardian, trustee or receiver, or in any other similar fiduciary capacity.

(2) An attorney's own personal funds.

(3) Business and investment monies of the attorney.

(4) Payroll taxes on employee wages.

X. Reconciliations (Section 4.4)

Each attorney must perform written trust reconciliations monthly, showing reconciliation of the cash balance derived from the cash receipts and cash disbursements totals, the checkbook balance, the bank statement balance and the client trust ledger balances.

XI. Rules for Receiving and Disbursing Trust Funds (Section 4.5)

A. Trust account withdrawals may be made only by authorized financial institution transfers or by check payable to a named payee and not to cash.

B. Trust checks payable jointly to a client and an attorney should be deposited to the trust account and generally not endorsed over to the client.

C. A lawyer has no general implied authority to endorse a client's name to a check.

D. An express power of attorney contained in a retainer agreement to routinely endorse a client's name on a check is highly improper and against public policy, except where (1) the check relates to a personal injury matter, (2) an institutional debt collections client authorizes the attorney to endorse the client's name to checks from debtors or (3) in other extraordinary circumstances that might justify the use of a specific power of attorney.

E. ATM and cash withdrawals are prohibited.

XII. Proper Methods for Withdrawing Legal Fees (Section 4.6)

Before an earned legal fee may properly be withdrawn from a trust account, the client must be given notice of the nature of services rendered and the amount of the legal fee proposed to be paid to the lawyer. If no objection is received within a reasonable time, the attorney may withdraw the fee proposed. Moreover, attorney fees which are justly due and owing may not remain in the trust account and must be promptly withdrawn. If not, the attorney is guilty of passive commingling.

All legal fees must be immediately deposited into the attorney's business account. Legal fees may not be paid by drawing trust checks directly to the attorney or his/her creditors.

XIII. Bank Charges (Section 4.7)

Funds of the lawyer reasonably sufficient to pay bank charges may be retained in the trust account. The sum of $250 is the maximum that should be so held.

Alternatively, the attorney may arrange with the financial institution to debit another account maintained at that financial institution for service charges to the trust account.

XIV. Interest and Investing Trust Funds (Section 4.8)

An attorney may ethically invest clients' funds in an interest bearing account on condition that:

A. The attorney either obtain the client's consent before investing the funds or notify the client of the investment without objection at the time the action is taken.

B. Any such investment must be undertaken with the greatest of care; only secure investments, such as governmentally-insured bank accounts, should be made.

C. All interest or accretion is the property of the client.

D. The funds must be maintained in a financial institution in New Jersey.

XV. Stopping Payment on Trust Checks (Section 4.9)

It is ethically improper to stop payment on a trust check issued to the sellers in a real estate transaction where the parties to the closing have agreed, by signing the closing statement, that all obligations have been met.

XVI. Uncollected Funds Doctrine (Section 4.10)

Drawing on trust funds that have not yet been "collected" by the attorney's financial institution is unethical. Such a practice is permitted, however, in real estate and commercial closings where the attorney draws against uncollected "bank, savings and loan (state and federal), cashier's or certified checks."

XVII. Electronic Fund Transfers (Section 4.11)

Electronic fund transfers out of an attorney's trust account by wire or by computer, must be authorized only by an attorney. The attorney must issue signed, written instructions to the financial institution stating the date, account number, payee and amount. The financial institution must then confirm that information in writing back to the attorney.

XVIII. Retention Period for Trust Records (Section 4.12)

All original records required to be maintained under *R.*1:21-6 must be maintained for a period of "seven years after the event which they record."

XIX. Trust Property Other Than Cash (Section 4.15)

Where the attorney receives non-cash trust property, the attorney must, in addition to normal trust obligations, (a) identify (i.e., label) it, and (b) take appropriate safeguards.

Section 4.1 The Mechanics Of Trust Accounting

In New Jersey attorneys are fortunate to have a detailed recordkeeping rule (Appendix A) that spells out in depth the nature and extent of the accounts and supporting records that attorneys must maintain. In most states, whether by rule, statute or case law, attorneys are simply admonished to account in accordance with "generally accepted accounting practices". Most attorneys, however, are not accountants and so this general direction, without more, is inadequate.

Under the New Jersey Recordkeeping Rule, complete compliance with trust accounting duties requires familiarity with only four items:

- Trust Checkbook [*R.*1:21-6(a)(1)];
- Trust Receipts Book [*R.*1:21-6(c)(1)(A)];
- Trust Disbursements Book [*R.*1:21-6(c)(1)(A)]; and
- Client Trust Ledger Book [*R.*1:21-6(c)(1)(B)].

A. Trust Checkbook

This is the most familiar trust account document. It may be identical in form to a personal checkbook, and anyone who can properly keep a personal checkbook can easily maintain a trust checkbook. A sample of the usual three-ring commercial checkbook is shown in Figure 3.

There are two parts to the checkbook itself: the checks and the stub. All checks must be prenumbered and issued in sequential order. *R.*1:21-6(c)(1)(G). The stub is a miniature accounting sheet which, given a correct beginning balance, allows the attorney to add in the amount of all deposits and to subtract the amount of all checks (and debits and bank fees), giving the attorney a new correct running checkbook balance. For those who like to look at these things horizontally, instead of vertically as the stubs are produced, the information would look like this:

DATE	DESCRIPTION OF CLIENT OR MATTER	DEPOSITS (ADD)	CHECKS (SUBTRACT)	RUNNING BALANCE
---	------	----	----	$12,500
5/02/08	John Smith	$5,000	----	$17,500
5/13/08	Rebecca Sands	----	$3,200	$14,300
5/20/08	John Smith	----	$1,300	$13,000
5/20/08	John Smith	----	$3,700	$9,300
5/21/08	John Smith	$2,000	----	$11,300

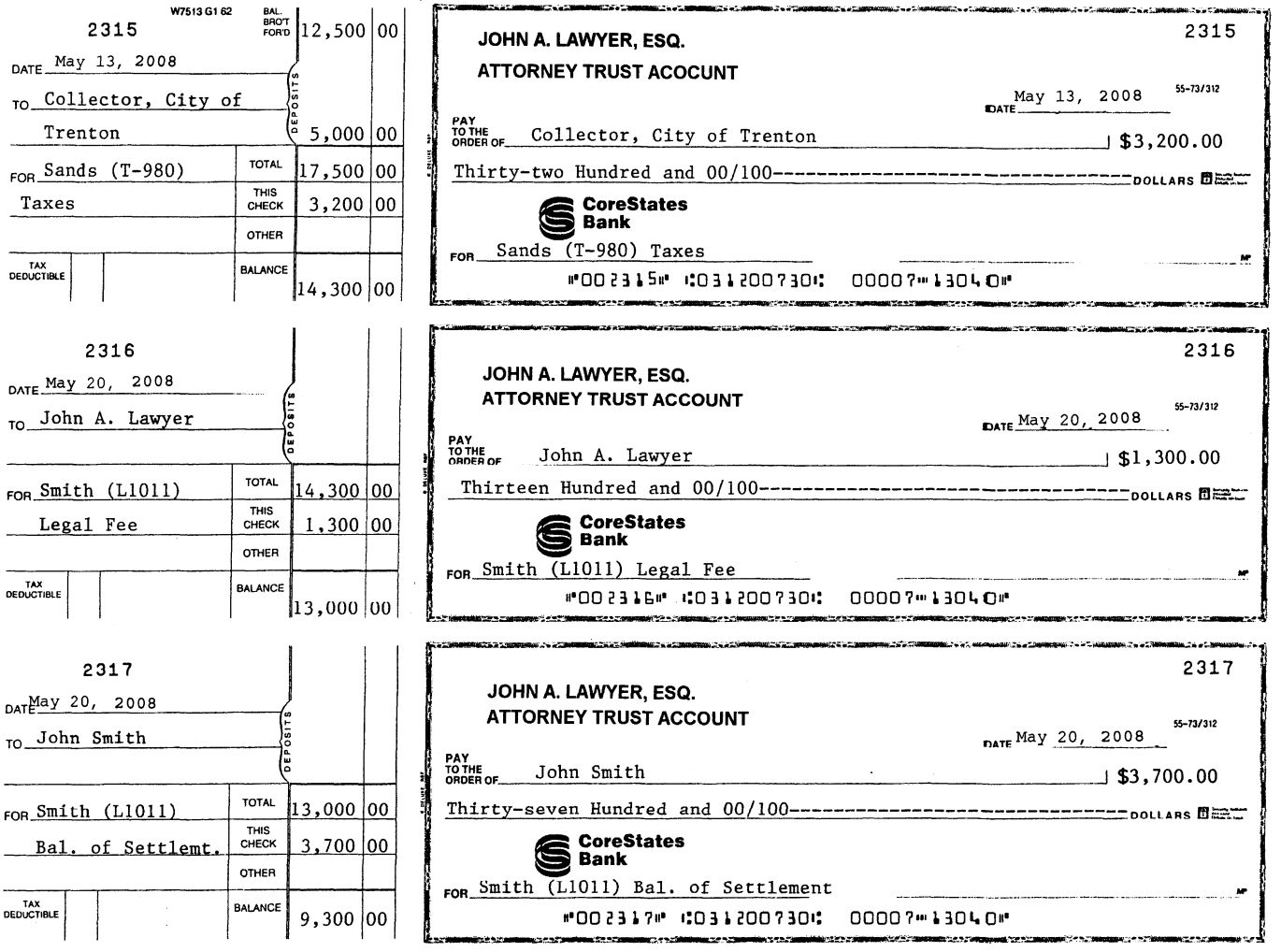
Monies come into the trust account via deposits, made either by the lawyer or, through electronic transfers or other credit memoranda, by the financial institution. If the attorney deposits the money, a deposit slip (Figure 4) will be completed by filling out the date, amount, client's last name or file number (to protect client confidentiality) and the source of the deposit

(by recording the bank identification code number of the check that is being deposited). Bank identification codes are found at the upper right-hand corner of a check. They were developed by the American Banker's Association and enable anyone with the code tables to locate the bank on which the check is drawn.

Some deposit slips are carbonized and the carbon portion, called a duplicate deposit slip, is returned to the attorney by the teller at the time the deposit is made. If carbonized deposit slips are not used, the teller will give the attorney a receipt showing the day, time and amount of the deposit. In this latter case it is important to record right on the receipt, the client's name or file number and the source bank code of the check that was deposited.

Deposits may also be made by the financial institution issuing a memorandum (a/k/a credit memo) showing the date, amount and source of the monies so deposited (Figure 5).This is the case where a client "wires" money directly from his or her account to the attorney's account. Monies may be disbursed (a/k/a withdrawn) either by the attorney or the financial institution. Checks written on a trust account are identical to other checks (Figure 6). Like deposits, checks must list the date and client or file number (*i.e.*, purpose). *R.*1:21-6(c)(1)(G). As a corollary to the source, which is required to be noted on the deposit ticket, every check must show the payee. *R.*1:21-6(c)(1)(A).

FIGURE 3 — THREE-RING TRUST CHECKBOOK



W7513 G1 62

2315
DATE May 13, 2008
TO Collector, City of Trenton
FOR Sands (T-980) Taxes
TAX DEDUCTIBLE

BAL. BRO'T FOR'D	12,500	00
DEPOSITS	5,000	00
TOTAL	17,500	00
THIS CHECK	3,200	00
OTHER		
BALANCE	14,300	00

JOHN A. LAWYER, ESQ.
ATTORNEY TRUST ACOCUNT
2315
55-73/312
DATE May 13, 2008
PAY TO THE ORDER OF Collector, City of Trenton $3,200.00
Thirty-two Hundred and 00/100---------- DOLLARS
CoreStates Bank
FOR Sands (T-980) Taxes
⑈002315⑈ ⑆031200730⑆ 0000?⑉1304⓪⑈

2316
DATE May 20, 2008
TO John A. Lawyer
FOR Smith (L1011) Legal Fee
TAX DEDUCTIBLE

DEPOSITS		
TOTAL	14,300	00
THIS CHECK	1,300	00
OTHER		
BALANCE	13,000	00

JOHN A. LAWYER, ESQ.
ATTORNEY TRUST ACCOUNT
2316
55-73/312
DATE May 20, 2008
PAY TO THE ORDER OF John A. Lawyer $1,300.00
Thirteen Hundred and 00/100---------- DOLLARS
CoreStates Bank
FOR Smith (L1011) Legal Fee
⑈002316⑈ ⑆031200730⑆ 0000?⑉1304⓪⑈

2317
DATE May 20, 2008
TO John Smith
FOR Smith (L1011) Bal. of Settlemt.
TAX DEDUCTIBLE

DEPOSITS		
TOTAL	13,000	00
THIS CHECK	3,700	00
OTHER		
BALANCE	9,300	00

JOHN A. LAWYER, ESQ.
ATTORNEY TRUST ACCOUNT
2317
55-73/312
DATE May 20, 2008
PAY TO THE ORDER OF John Smith $3,700.00
Thirty-seven Hundred and 00/100---------- DOLLARS
CoreStates Bank
FOR Smith (L1011) Bal. of Settlement
⑈002317⑈ ⑆031200730⑆ 0000?⑉1304⓪⑈

FIGURE 4 — DEPOSIT SLIP

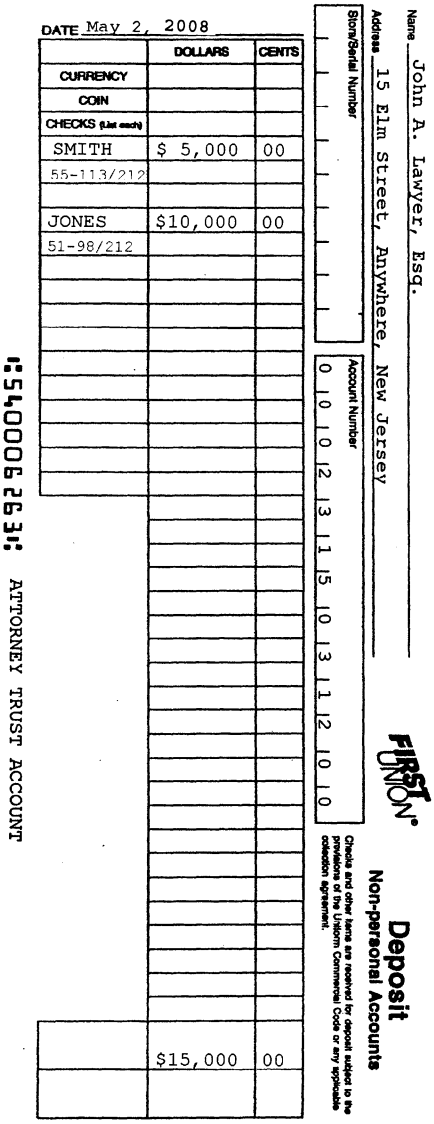


FIGURE 5 — CREDIT MEMORANDUM

FIRST UNION®

Financial Center	FC Number	FC Name	FC City	FC State
		Brunswick Ave. Branch	Trenton	NJ

Credit Memo

Financial Center: Document a clear explanation for adjustment below to ensure accurate Financial Institution records.

We credit your account as follows: Wire Transfer - Chase Manhattan

Burtol Corp. Acct. 819930010

Store/Serial Number	Routing/Transit Number	Account Number (For CAP Accounts, use 10-digit number.)	Total Amount Credited
	540004207	0 0 0 2 3 1 5 0 3 1 2 0 0	$2,000 00

0000 535924 (100/pkg Rev 02)

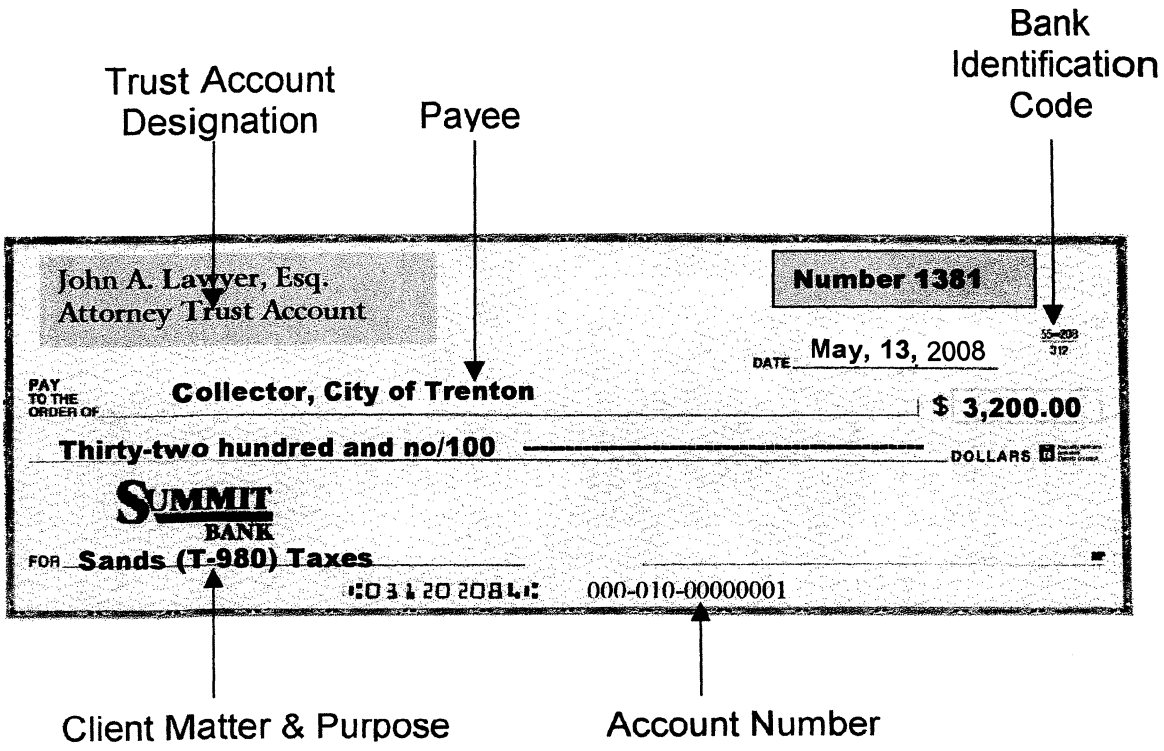
John A. Lawyer, Esq.
Attorney Trust Account
15 Elm Street
Anywhere, New Jersey

RC No.	Date
	May 21, 2008
Prepared By	
Customer/Approving Signature	

⑆540004207⑆

POSTING COPY

FIGURE 6 — TRUST ACCOUNT CHECK



As with deposits, withdrawal can be made by the financial institution issuing a debit memorandum. (Figure 7). Thus, for example, where funds are electronically wired from the attorney's account to that of his/her client in California, the attorney's financial institution will issue a memorandum advising the date, amount and source of the monies so transmitted. Debit memos are also issued for service items such as (a) cost of wire transfers, (b) monthly service charges, (c) overdraft notices, (d) check printing charges, (e) returned item notices, and other services rendered to you for which a fee is charged. Section 4.7 will explain how to properly record and handle these service items.

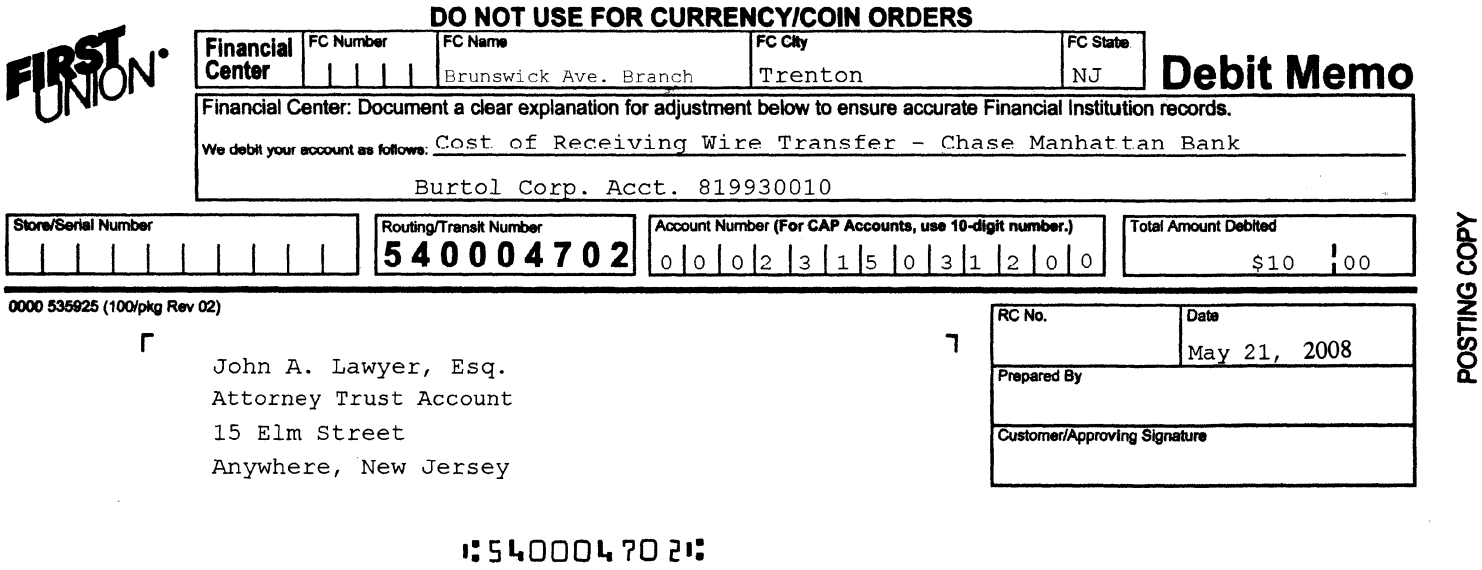
That is all there is to handling a trust account checkbook! It is really not much different from handling a personal checking account. Three rules, however, make it work. First, all entries (deposits and disbursements) should be recorded contemporaneously (within 24 hours of the event). Second, all entries must be exact, to the penny. There is no room for rounding off figures. This practice may be tolerable for personal accounts, but is definitely not acceptable for a trust account. Third, attorneys must always keep a running balance, preferably after each deposit or disbursement. *R.*1:21-6(c)(1)(G). If you do, and if you keep in mind Key Concepts #2 and 3 (regarding collection of funds and timing — Sections 2.2 and 2.3), you almost assuredly will never be responsible for overdrawing your trust account.

B. and C. Trust Receipts and Disbursements Books

While these items sound foreboding to some, they are in fact much less complicated than the trust checkbook. In fact the Trust Receipts Book is nothing more than a chronological listing of **each and every** deposit and credit made to the trust account. Conceptually, a yellow legal pad would serve the purpose. From the point of view of "generally accepted accounting practice," however, a bound book (or journal) which gives these records some permanency is the required form. *R.*1:21-6(d). Figure 8 shows a sample page from such a book. Note that it contains the exact same information required to be maintained in the trust checkbook stub and on the deposit slip or receipt itself, namely:

- date;
- source;
- client name or matter; and
- amount.

FIGURE 7 — DEBIT MEMORANDUM



DO NOT USE FOR CURRENCY/COIN ORDERS

FIRST UNION

Financial Center	FC Number	FC Name	FC City	FC State
		Brunswick Ave. Branch	Trenton	NJ

Debit Memo

Financial Center: Document a clear explanation for adjustment below to ensure accurate Financial Institution records.

We debit your account as follows: Cost of Receiving Wire Transfer - Chase Manhattan Bank

Burtol Corp. Acct. 819930010

Store/Serial Number	Routing/Transit Number	Account Number (For CAP Accounts, use 10-digit number.)	Total Amount Debited
	540004702	0 0 0 2 3 1 5 0 3 1 2 0 0	$10 00

0000 535925 (100/pkg Rev 02)

John A. Lawyer, Esq.
Attorney Trust Account
15 Elm Street
Anywhere, New Jersey

RC No.	Date
	May 21, 2008

Prepared By

Customer/Approving Signature

POSTING COPY

⑆540004702⑆

TRUST RECEIPTS BOOK

MONTH OF: MAY 20 08

DATE	SOURCE	CLIENT	CASE NO. OR FILE NO.	AMOUNT	DEPOSIT
5/2/08	CHECK from XYZ Ins. Co.	John Smith	L1011	$5,000	$5,000
5/21/08	WIRE TRANSFER - from Client's Acct. at Summit Bancorp	Burtol Corp.	C492	$2,000	
5/21/08	CHECK from Client's husband, John Doe	Jane Doe	M303	$ 750	$2,750
	PRO FORMA JOURNAL OR REGISTER REPRESENTS A BOOK OF ORIGINAL ENTRY WITHIN THE STANDARDS OF ACCEPTED ACCOUNTING PRACTICE. - THIS RECORD IS OF A PERMANENT NATURE. IT MUST BE MAINTAINED WITHIN THE PROVISIONS OF R. 1:21-6-(c)(1)(A)				

FIGURE 8 — TRUST RECEIPTS BOOK

Similarly, the Trust Disbursements Book is a chronological listing of every disbursement made from the trust account. Figure 9 shows a sample page of such a book. Please observe that the sample contains the identical information required to be recorded on the trust checkbook stub and on the check (for a debit memorandum) itself, namely:

- date;
- payee;
- purpose; and
- amount.

In defining a Trust Receipts Book, I stated that it must contain a chronological list of each and every deposit. This includes all credit memos from financial institutions. Figure 8 contains an entry for one such credit memo, an electronic wire transfer. Similarly, the Trust Disbursements Book must reflect **each and every** disbursement including any debit memos received. Section 4.7 will be devoted entirely to a discussion of the proper trust accounting methods for handling debit memos for all bank charges.

At the end of each month, the total of all monies received must be added up as reflected in the Trust Receipts Book. Likewise, the total of all disbursements must be added as shown in the Trust Disbursements Book. These monthly totals should then be placed on the Control Sheet (Figure 14) in the places indicated. As explained later in Section 4.4, the Control Sheet is one of the first steps in the reconciliation process and filling out the Control Sheet monthly puts you a step ahead in the reconciliation process.

But why record the same information twice, you might ask? Why record all the same information you included in writing out a check in a separate Trust Disbursements Book? Good question! There are several good reasons.

The first reason relates back to Key Concept #4, Maintaining an Audit Trail (Section 2.4). The deposit slips, receipts, checks and memoranda are all referred to as "source documents." They are the documents that actually "move" money around. Therefore, they must reflect the descriptive information above so they provide a complete audit trail, a direct link, to the trust receipts and disbursements books and to the clients' ledger book which will be covered next. But they are not permanent records. Recording that information in receipts and disbursements books, however, gives them permanency and accords with "generally accepted accounting practice." R.1:21-6(d).

TRUST DISBURSEMENTS BOOK

MONTH OF: MAY 20 08

DATE	CHECK NO.	PAYEE	PURPOSE	CLIENT	CASE NO. OR FILE NO.	AMOUNT
5/13/08	1381	Collector, City of Trenton	Taxes	Rebecca Sands	T-980	$3,200.00
5/20/08	1382	John A. Lawyer	Legal Fee	John Smith	L1011	$1,300.00
5/20/08	1383	John Smith	Balance of Settlement	John Smith	L1011	$3,700.00
5/21/08	Debit Memo	Summit Bancorp	Cost of Wire Transfer	Burtol Corp.	C492	$ 10.00
5/31/08	Debit Memo	Summit Bancorp	Monthly Service Charge	Attorney	----	$ 5.75
	THIS PRO FORMA JOURNAL OR REGISTER REPRESENTS A BOOK OF ORIGINAL ENTRY WITHIN THE STANDARDS OF ACCEPTED ACCOUNTING PRACTICE.					
	- -					
	THIS RECORD IS OF A PERMANENT NATURE. IT MUST BE MAINTAINED WITHIN THE PROVISIONS OF R. 1:21-6(c)(1)(A)					

FIGURE 9 — TRUST DISBURSEMENT BOOK

The other reasons relate to the purposes for the trust receipts and disbursements books, which are three-fold. Primarily under the commonly used double-entry bookkeeping method, these two records permit the attorney to double check the general running balance in the trust account to make sure it is correct. This function will be explained further later in Section 4.4 on "Reconciliations." Next, these two books serve as an easily accessible means of locating items by arranging all deposits together chronologically in one book, and all disbursements together chronologically in another book. This is particularly handy at reconciliation time when a transposition error occurs. In short, it makes it easy to find mathematical errors chronologically. Finally, and this is very important to realize, trust receipts and disbursements books allow the attorney to look at trust account activity on a macro-level. Add up all of the deposits listed in the trust receipts book for a particular month (or year) and see how much trust money the attorney took in during that period. Similarly, add up all the disbursements in the trust disbursements book for a month (or a year) and see how much trust money went out during that period. Add the amount of deposits to the amount of disbursements for a given period, say one month, and the attorney can tell the total amount of client funds for which she was responsible.

All three of the records that have been discussed so far—the Trust Checkbook, Trust Receipts Book and Trust Disbursements Book—give the "big picture," the overview. However, while this is very important, it is at least equally important to know, at any given time, exactly how each client's funds stand. This can be ascertained by the fourth and final item—the Clients' Trust Ledger.

D. Client Trust Ledger Book

Recall Key Concept #1 (Section 2.1), which stated the proposition that separate clients are separate clients. This is the foundation of trust accounting, maintaining the individual separation and control that each client has the right to expect.

In order to maintain this full control and separate accountability of each individual client's trust funds, attorneys maintain an individual accounting record of every deposit to and disbursement from that particular client's account. This is accomplished by maintaining a separate book, called a Clients' Trust Ledger (Figure 10), with a separate page for each trust client.

The concept of "an appropriate ledger book" required by *R.* 1:21-6(c)(1)(B) contemplates "an integrated record which will show the current status of all funds collected or received for the credit of a particular client or beneficiary, all payments out and the amount, if any, remaining due the client." *In re Rabb*, 73 N.J. 272, 276 (1977). The Client Trust Ledger Book itself may be either bound or looseleaf, with removable ledger sheets that may be taken out when the client matter is closed. Original closed ledgers should not, however, be placed in the closed case file where they will be lost forever unless the name of the client is recalled. While a photocopy of the closed ledger sheet may properly be placed in the individual client case file, the original should be placed in a closed three ring binder or separate file and arranged alphabetically for future reference.

CLIENTS' TRUST LEDGER

JOHN SMITH
NAME OF CLIENT

L 1011
FILE OR CASE NUMBER

GO GO TAXI CO.
LEGAL MATTER OR ADVERSE PARTY

DATE	DESCRIPTION OF TRANSACTION	CHECK NO.	FUNDS PAID	FUNDS RECEIVED	BALANCE
5/2/08	Proceeds of Negligence Settlement from XYZ Ins. Co.			$5,000	$5,000
5/20/08	Legal Fee $1,000 + 300 Cost Reimbursement - John A. Lawyer	1382	$1,300		$3,700
5/20/08	John Smith - Net Proceeds	1383	$3,700		0.00
	THIS PRO FORMA CLIENT'S TRUST LEDGER SHEET MUST BE MAINTAINED WITHIN THE CONTEXT OF R. 1:21-6(c)(1)(B)				
	EACH CLIENT FOR WHOM TRUST FUNDS ARE BEING HELD REQUIRES PREPARATION OF A SEPARATE LEDGER SHEET				

FIGURE 10 — CLIENTS' TRUST LEDGER

A separate client ledger must, by rule, be maintained "for each separate trust client". *R.*1:21-6(c)(1)(B). Thus, an entirely separate page must be set up for each client, regardless of the fact that all funds coming into the attorney's hands are disbursed simultaneously. This situation commonly occurs, for example, in real estate transactions. Good recordkeeping practices indicate that the reverse side of a ledger should also be reserved for the sole use of that single client. Do not use the reverse side of one client's ledger for another client's case. Likewise, where a single client has multiple matters being handled by the same attorney, each separate financial matter must be reflected on a separate client ledger.

Figure 10 reflects a sample ledger page for a mythical client, John Smith. Like the trust account checkbook, a "running balance" on each individual client ledger sheet is maintained. This is done because attorneys must **NEVER** disburse more money than they have on hand (collected) to the credit of that individual client. Keeping a running balance is required [*R.*1:21-6(c)(1)(B)] and permits the attorney to know this at a glance. Note the descriptiveness of the client ledger sheet. This requirement conforms to Key Concept #4 concerning maintenance of a complete audit trail (Section 2.4). The degree of descriptiveness is prescribed for the client ledger sheet by court rule. *R.*1:21-6(c)(1)(B). It must reflect:

- the source of finds deposited;
- the names of all persons (i.e., clients) for whom funds are or were held;
- the amount of such funds;
- the description and amounts of all charges or withdrawals (i.e., disbursements) from such accounts;
- the names of all persons to whom funds were disbursed.

Section 4.2 What Must And Must Not Go Into An Attorney Trust Account

The following is a summary of the rules regulating what receipts must, may, and must not, be deposited into an attorney's trust account.

A. Mandatory Receipts

(1) All funds belonging to the client and "entrusted to the attorney's care" by clients when the attorney is acting as a legal representative. *R.*1:21-6(a)(1). Note that funds held by an attorney as a specified fiduciary are specifically excluded and are discussed *infra* under (8). Whenever an attorney receives and holds moneys in the capacity as attorney for another, those funds must be promptly deposited and the client promptly notified of their receipt. RPC 1.15(a)

and (b). Cash cannot be held outside of the trust account for other than a very brief period of time before it is deposited in the trust account.

(2) All funds in which both the attorney and the client claim an interest arising out of the course of the legal representation. RPC 1.15(c). Thus, where an attorney receives an insurance settlement from a carrier out of which the lawyer is to be paid a contingent fee pursuant to *R.*1:21-7, and where the lawyer takes possession of those monies, they must be collected through the banking process and disbursed.

(3) All funds in which both the client and a third person have an interest that come into the attorney's possession during representation of the client. RPC 1.15(b) and (c). Thus, if an attorney for the seller in a real estate transaction holds $12,500 as an earnest money deposit pending closing under a contract of sale, those funds must be deposited into an attorney trust account. Also, where an attorney has notice of just claims of third parties to client funds coming into the attorney's possession, the attorney may have a duty to hold such funds in an attorney trust account and to not distribute them immediately to the client. See *In re Turner*, 83 N.J. 536 (1980) where an attorney who represented a corporation in receivership proceedings was reprimanded for not holding monies received in trust for the benefit of all parties to the proceeding, instead choosing to disburse monies to himself for legal fees. *See also In re Zeitler*, 158 N.J. 182 (1999).

(4) General retainers for legal services must be deposited in the attorney trust account **only** where there is an explicit understanding with the client that the retainer will be separately maintained. *In re Stern*, 92 N.J. 611, 619 (1983).

B. Permissive Receipts

(5) General retainers for legal services may be deposited in the attorney trust account even in cases where no explicit understanding has been reached with clients that they will be separately maintained. Indeed, where the amount of the retainer is large, or where the work will not start for a significant time in the future, the best practice calls for such retainers to be deposited into the attorney trust account. This is so because a client can discharge an attorney at any time. RPC 1.16(a)(3). Even with respect to the so-called "nonrefundable" retainer, every fee agreement is subject to fee arbitration (*R.*1:20A-1) and review for overreaching (*R.*1:20A-4). *Advisory Opinion 644*, 126 N.J.L.J. 894 (Oct. 4, 1990) (Appendix F). This is especially so since an attorney may ethically charge only a "reasonable" fee [RPC 1.5(a)] and, upon termination of the representation, must "(refund) any advance payment of fee that has not been earned or incurred." RPC 1.16(d). Consequently, it is simply easier economically to refund money that has been held in trust, if the occasion arises, rather than to raise the cash after it has been spent.

(6) Advances for costs that are received from clients may be deposited either in the attorney trust account or directly into the attorney business account. *In re Stern*, 92 N.J. 611, 619 n.2 (1983). [But see Section 6.9A]

(7) "Funds of the lawyer that are reasonably sufficient to pay bank charges" may be deposited into the attorney trust account. RPC 1.15(a). This is a narrowly drawn exception of necessity to the universal proscription [discussed *infra* under item (9)] against an attorney commingling her own funds with trust monies.

C. Prohibited Receipts

(8) An attorney is prohibited from depositing into an attorney trust account funds coming into the attorney's hands in any specified fiduciary, as opposed to legal-representative, capacity. *R.* 1:21-6(a)(1) lists by way of example, but not by way of limitation, funds which the attorney receives while acting as an "executor, guardian, trustee, or receiver." By caselaw and/or statute, such specified fiduciaries have independent duties to account that require the maintenance of proper records in accordance with generally acceptable accounting practice. See, for example, *In re Herr*, 22 N.J. 276 (1956) (trustee under inter vivos trust), *N.J.S.A.* 3B:17-2 (accounting by personal representatives) and *N.J.S.A.* 3B:17-3 (accounting by testamentary trustees and guardians).

(9) The most universally recognized prohibition of all is that an attorney's own personal funds must not be commingled with those of clients. Obviously the attorney must not deposit them in the attorney trust account, except, of course, for a small amount reasonably necessary to pay bank charges, as stated *supra* under item (7).

(10) Business and investment monies of an attorney are simply personal funds that the attorney has chosen to use for a specific purpose. Essentially they are subsumed in item (9). They must not be placed in the attorney trust account. For example, if an attorney invests solely her own money as a principal (or as a partner with others) in an apartment complex, or if the attorney purchases stock for the attorney and her family from personal funds, or buys equipment for use in the law office from personal funds, none of these monies may ever pass through the attorney trust account. It is irrelevant whether the attorney makes these purchases individually or jointly with his or her family or others. So long as the attorney is using personal funds and is not acting as an attorney for others in the transaction, the monies are not attorney trust funds.

If, however, the attorney is acting in a dual role as investor-lawyer, or if the attorney secures an ownership interest in a client's business as part (or in lieu) of the legal fee, then monies that arise out of the lawyer's legal representation of others are attorney trust funds and must be deposited into the trust account, because they are part of the traditional attorney-client relationship. In these situations where the attorney plays a dual role, in order to avoid confusion the best practice is to open a separate specific trust account for the particular venture.

(11) Payroll taxes on employees' wages, as explained further in Section 6.9B, are not client's funds. Rather they arise out of an employer-employee relationship. They must not be placed in an attorney trust account.

Section 4.3 Putting It All Together

We have separately looked at each of the four items that comprise the core of correct attorney trust accounting. They are:

- Trust Checkbook;
- Trust Receipts Book;
- Trust Disbursements Book; and
- Clients' Trust Ledger Book.

Now we shall see how they fit together to form an integrated accounting system.

Figure 11 sets forth a simple key to show the trust documents on which deposit and disbursement information must be recorded.

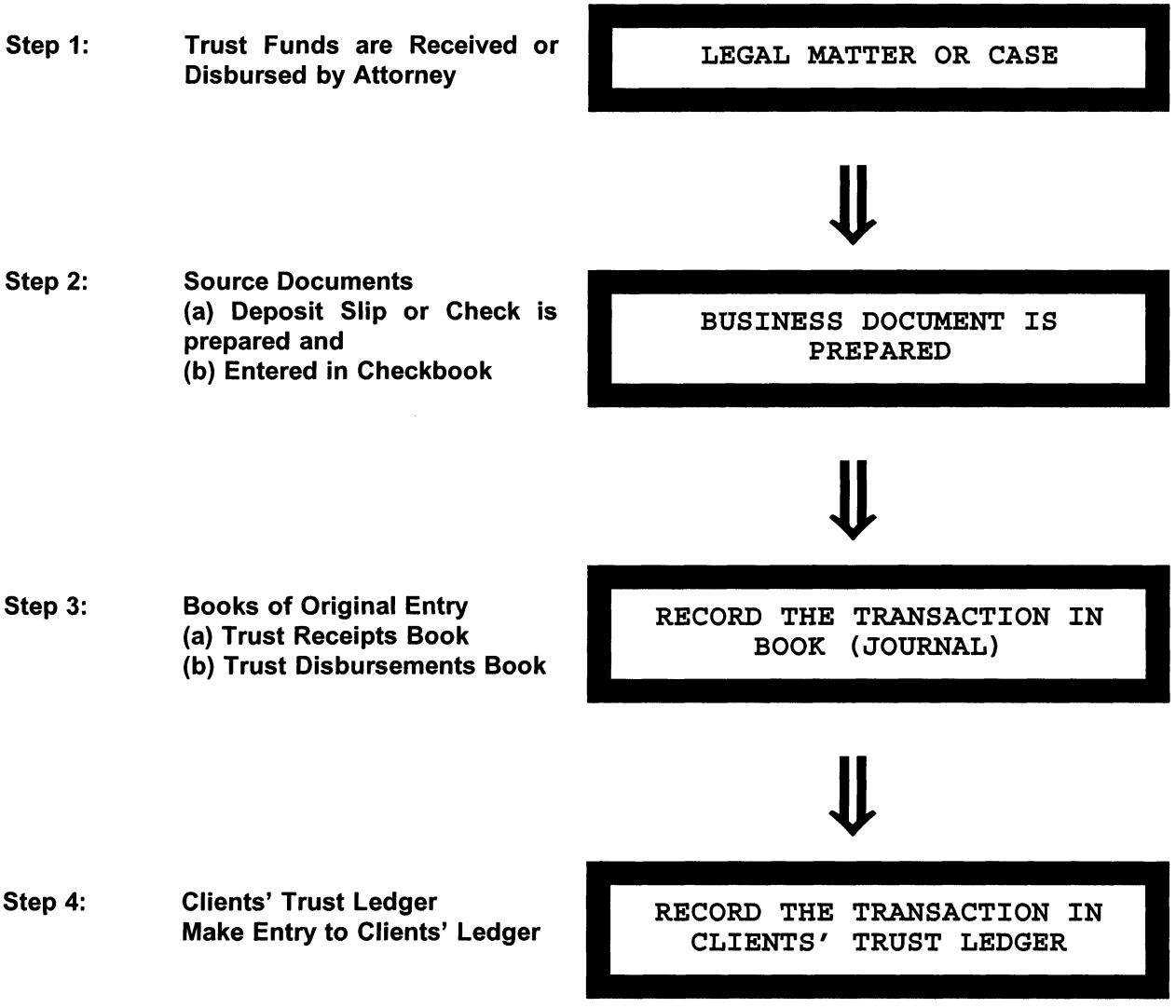
FIGURE 11 — TRUST ENTRY KEY

TRUST RECORDS	ENTER DEPOSITS	ENTER DISBURSEMENTS
A. TRUST CHECKBOOK	X	X
B. TRUST RECEIPTS BOOK	X	
C. TRUST DISBURSEMENTS BOOK		X
D. CLIENTS' TRUST LEDGER	X	X

The flow chart shown in Figure 12 helps the attorney visualize the sequence in which these items are entered on the various components of our trust accounting system. Thus, as a deposit comes in, say a settlement in a negligence matter, the check is received by the attorney (Step 1). The attorney then preparers a source document, which is a deposit slip, (Step 2), physically makes the deposit and has the duplicate deposit slip returned, stamped "received" with the date. This information is then entered in the trust checkbook (Step 2). Next, the deposit information is entered chronologically in the Trust Receipts Book (Step 3) and is also recorded on the individual client's trust ledger (Step 4).

FIGURE 12 — TRUST ACCOUNTING FLOW CHART

TRUST ACCOUNTING FLOW CHART



Section 4.4 Reconciliation—The 3-Way Check

Everybody makes mistakes when it comes to figures, even banks and accountants. This should not be surprising because there are a lot of ways that mistakes can occur. Simple arithmetic mistakes in addition or subtraction are common. Transposition errors occur when our eye rearranges the sequence of numbers and we record $122.92 when the correct figure is $129.22. In a similar vein, banks, which process checks and deposits electronically by the millions, will sometimes make an encoding error when one of its coders reads a $10,000 check but encodes the amount that appears at the bottom right-hand corner of the returned check as $1,000 or $100,000. Other errors that may occur run the gamut from simply skipping one of the many lines while transferring figures from one list to another, to perhaps the simplest mistake of all — forgetting to record a withdrawal or a deposit.

The reconciliation process is critical. It allows the attorney to detect when an error has occurred by showing that items, which should balance, do not. Our recordkeeping rule (and generally accepted accounting practice) requires that a written reconciliation be performed "at least monthly." *R.*1:21-6(c)(1)(H). Naturally, the more frequently an account is reconciled, the sooner one will be able to detect, and thus correct, an error. Copies of all written records reflecting reconciliations must be retained. *R.*1:21-6(c)(1)(H).

Reconciliation is the process by which all required trust records are brought into agreement. More simply, perhaps, it represents a balancing process by which the trust account records are all brought into a state of equilibrium. Based on the model double-entry bookkeeping system, a full *R.*1:21-6 reconciliation requires a three-step review and analysis of four documents as shown in Figure 13. By this process:

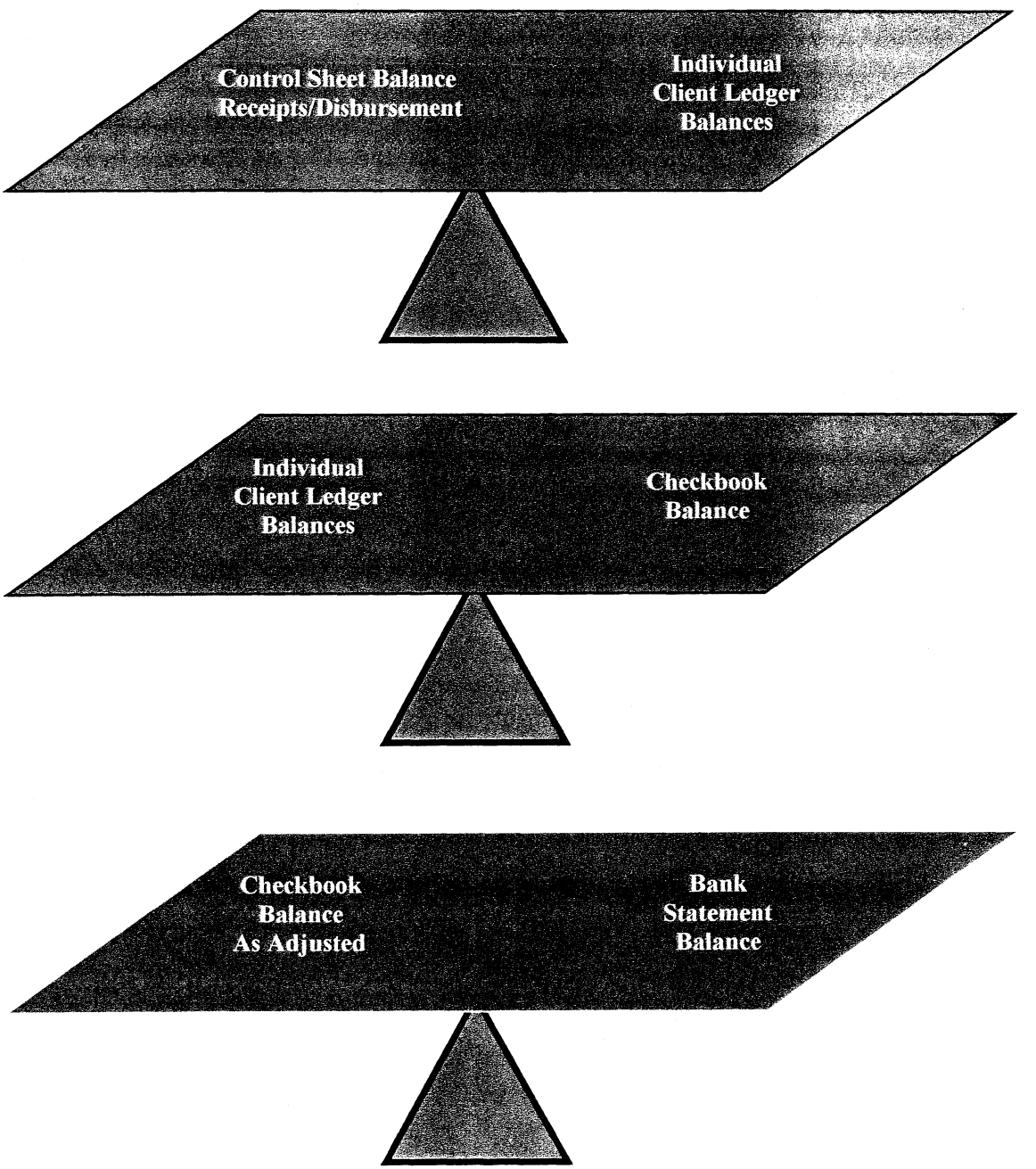
(1) the balance of all trust receipts and disbursements is reconciled to the total of individual client ledger balances on hand;

(2) the total of individual client ledger balances on hand is then reconciled to the trust checkbook balance; and finally,

(3) the trust checkbook balance (as adjusted) is then reconciled with the balance on the trust bank account statement.

FIGURE 13 — THREE-WAY RECONCILIATION SCALE

Three-Way Reconciliation Scale



STEP NO. 1

The very first step in the reconciliation process is to obtain a correct beginning balance. You can **never** reconcile an account unless you know the correct balance that you should have on hand to start with. When a new trust account is opened, the first time the account is reconciled the beginning balance will be zero. The beginning balance for each succeeding period for which a reconciliation is prepared will necessarily depend upon the prior reconciled balance being correct. This requires any discovered errors to be resolved. If you are not sure that the beginning trust balance is correct, you should consult your financial institution or, if necessary, a bookkeeper or an accountant. Carrying an incorrect balance only compounds the problem, as time makes finding and correcting errors more and more difficult and expensive.

STEP NO. 2

The second step in the reconciliation process is to add up all items for the monthly reconciliation period that have been recorded in the Trust Receipts Book (Figure 8). The same total is then compiled for the Trust Disbursements Book (Figure 9). Both of these figures are placed on the Receipts/Disbursements Control Sheet (Figure 14), together with the beginning balance. The total of trust funds received is then added to the beginning balance. From the resulting figure, the total of trust funds disbursed is subtracted. This results is a new balance figure. It is this figure that will form the bedrock of the reconciliation process. That figure is also placed in the appropriate place on the Trust Reconciliation Sheet (Figure 15).

STEP NO. 3

Next, prepare a list of the names and balances on hand (as of the bank statement date) for all trust clients and place them in the appropriate location on the Trust Reconciliation Sheet. These client figures are obtained by taking the last running balance from each individual Client's Trust Ledger Sheet and inserting the total of all individual ledger balances in the appropriate place on the Trust Reconciliation Sheet. (If there are many clients, a separate schedule of clients' ledger balances should be made.)

STEP NO. 4

Compare the Control Sheet Balance to the total Clients' Trust Ledger Balance. They must be equal. *R.* 1:21-6(c)(1)(B).

STEP NO. 5

Place the amount of the checkbook balance as shown in the Trust Checkbook in the appropriate place on the Trust Reconciliation Sheet. Compare the amount of the Total Clients' Ledger Balance to the balance in the Trust Checkbook. They must be equal!

STEP NO. 6

List all outstanding checks and outstanding deposits (also called deposits in transit) on the Trust Reconciliation Sheet that are not reflected on the latest monthly bank statement for the reconciliation period. Add the outstanding checks to the Trust Checkbook Balance and place that amount in the place indicated on the Trust Reconciliation Sheet. Subtract from that figure all outstanding deposits and place that amount opposite the entry titled "Reconciliation Balance." Insert the Bank Statement Balance on the Trust Reconciliation Sheet.

STEP NO. 7

Compare the Reconciliation Balance to the Bank Statement Balance. They must be equal!

Congratulations! If both figures are equal, you have successfully, and correctly reconciled your trust account. If there is a difference between the two figures, roll up your sleeves, call your financial institution, your bookkeeper or check with an accountant, Whatever you do, do not ignore the problem. Figures that do not reconcile only get more difficult and more costly to reconcile with time.

FIGURE 14 — TRUST RECEIPTS/DISBURSEMENTS CONTROL SHEET

TRUST RECEIPTS/DISBURSEMENTS CONTROL SHEET FOR 2008

Month	Trust Funds Received	Trust Funds Disbursed	Balance
			$ 49,500.00
JANUARY	$ 87,000.00	$126,500.00	$ 10,000.00
FEBRUARY	$322,000.00	$290,000.00	$ 42,000.00
MARCH	$ 95,500.00	$121,500.00	$ 16,000.00
APRIL			
MAY			
JUNE			
JULY			
AUGUST			
SEPTEMBER			
OCTOBER			
NOVEMBER			
DECEMBER			
TOTAL			

FIGURE 15 — TRUST RECONCILIATION SHEET

TRUST RECONCILIATION SHEET

As of the month ended
March 2008

		BALANCE
Receipts/Disbursements Control Sheet Balance		$16,000*
Clients' Trust Ledger Balances:		
NAME OF CLIENT	**AMOUNT**	
Smith	$ 1,000	
Jones	$ 500	
Wood	$ 8,000	
Johnson	$ 6,400	
Attorney Funds (Bank Charges)		$ 100
Total of Clients' Trust Ledger Balances		$16,000*
Trust Checkbook Balance (at end of month)		$16,000*
Add: All Outstanding Checks	$ 2,500	
	$18,500	
Less: All Outstanding Deposits	$ 4,200	
	$14,300	
Trust Checkbook Reconciliation Balance		$14,300**
Balance per **March** bank statement (at end of month)		$14,300**

*These amounts must be identical to each other.
**These amounts must agree with each other.

Section 4.5 Rules For Receiving And Disbursing Trust Funds

There are several important rules that have developed in respect of the receipt and disbursement of trust funds. These special methods for handling client trust monies are embodied in both court rules as well as caselaw and advisory opinions. Most of these special rules and methods can be best understood if Key Concept #4 is kept in mind: Always Maintain An Audit Trail (Section 2.4).

With respect to receipts, the general rule is, and long has been, that all trust "funds entrusted to (the attorney's) care" must be deposited into the trust account. *R.*1:21-6(a)(1). This means that "the full amount of checks made payable to an attorney . . . as well as all cash similarly paid" should be deposited into the trust account and then disbursed from that account. *In re Banner*, 31 N.J. 24, 28 (1959). While occasionally cash trust monies are received from clients, that cash must be deposited in the trust account after a reasonably short time. Under our rules cash cannot be held in a safe, envelope, closet or any other place except the trust account. See *In re Freimark,* 152 N.J. 45, 53 (1997) who asserted that he kept $18,000 in clients' trust funds at home in a "rice bag". He was disbarred for knowing misappropriation.

All trust account receipts "shall be deposited intact." *R.*1:21-6(c)(1)(A). Thus, checks payable jointly to a client and an attorney should generally not be endorsed by the attorney and turned over in full to the client. Rather, the better procedure is to have the client and attorney endorse such joint checks and deposit the checks in the attorney trust account. After clearance, the attorney can disburse the appropriate amount to the client for proceeds and to the attorney for a legal fee. See *In re Shaw*, 88 N.J. 433, 440 (1982). In this way the attorney maintains an audit trail so that the attorney can document exactly how client trust funds were disbursed while in the attorney's custody. On the other hand, if the attorney circumvents the trust accounting records by simply endorsing and delivering to the client a third party check payable to the client and the attorney (and without maintaining a copy of the check), the attorney will be hard pressed to prove what happened to the money years later. It should be noted that *R.*1:21-6(c)(1) provides that all required bookkeeping records are to be maintained in a "current status" and retained "for a period of seven years" after the event. During that seven year period, the attorney is fully accountable in a disciplinary proceeding for the handling of clients' trust funds.

The issue has been raised on a number of occasions as to whether it is proper for an attorney to actually endorse the client's name to a check payable to the attorney's order (or, of course, payable jointly with the client) and then deposit the check in the attorney trust account. The law is that routine endorsements by the attorney are generally improper. It has been held that an attorney has no general implied authority to endorse a client's name to a check, even where a valid attorney-client relationship exists. *In re Chasen*, 91 N.J. 381, 384-385 (1982). It is also improper too deposit a check made payable to the client and attorney's name. *In re Dranov*, 179 N.J. 420 (2004)(six-month suspension).

However, several exceptions to this general prohibition have been carved out. It has long been the rule that a general retainer agreement that routinely contains an express power of attorney to endorse a client's name on checks is against public policy. This issue arose in a case where the form of retainer agreement expressly contained a power of attorney giving the lawyer the specific right to routinely endorse clients' names on a negligence settlement check, deposit it and make appropriate distribution after the check cleared. In holding the provision to be "highly improper" the Supreme Court stated:

> The practice of insurance carriers or other settlers in drawing settlement checks in the joint names of the attorney and the claimants is to protect and preserve the interests of all three parties to the transaction. The form of retainer in question facilitates the subversion of that purpose and is unqualifiedly disapproved. *In re Conroy*, 56 N.J. 279, 282 (1970).

Obviously this does not mean that in an individual case it may not be appropriate for an attorney to draft a Power of Attorney that contains such authority. Thus, in "extraordinary circumstances" where the client will be out of the country, or if the client is disabled, a Power of Attorney is appropriate to authorize a lawyer to sign necessary documents including checks. The Supreme Court clarified its *Conroy* holding in 1991 *In the Matter of Advisory Committee on Professional Ethics Opinion 635*, 125 N.J. 181 (1991):

> We should make clear exactly what it is that we are disapproving: the routine use of a form that extends power of attorney to the lawyer in endorsing the clients' name to a settlement draft. We will not permit the form to become a part of the package of a lawyer's ordinary closing papers. We acknowledge that there may be extraordinary circumstances—the client on the eve of departure for an extended stay in a foreign land, a client about to undergo surgery, with a doubtful prognosis and an extended hospital stay to follow—that might justify use of such a power of attorney. *Id.* at 187.

Thereafter, in 1994 the Court modified the prohibition, but only as to checks in personal injury matters. In a **NOTICE TO THE BAR** (136 N.J.L.J. 638 - April 25, 1994) the Court announced that "attorneys may, in personal injury matters only, use authorization to endorse forms". The catalyst for this change was the so-called payee-notification rule that was subsequently adopted by the State Department of Insurance. That regulation (N.J.A.C. 11:2-17.11) requires insurers, at the same time payment is being made to the attorney of record on a claim, to provide written notice of payment directly to the claimant. The Court stated that with the adoption of this payee-notification rule "the concerns voiced by the Court in its (1991) decision have been addressed".

Another exception to the rule prohibiting routine authorization to endorse forms arises where attorneys perform collections on a contingency basis for institutional creditors. In the *Matter of Advisory Committee on Professional Ethics, Docket No. 22-95,* 144 N.J. 590 (1996) the Supreme Court held that lawyers who concentrate in debt collections may, at the request of an institutional client, use a power of attorney to endorse the client's name to checks from debtors without violating the normal ethical rules.

As to the proper method of disbursement from the trust account, the recordkeeping rule itself gives express guidance: All trust account withdrawals shall be made only by "attorney authorized financial institution transfers" or "by check payable to a named payee and not to cash." *R.*1:21-6(c)(1)(A). ATM cards or cash withdrawals are not a permissible method of withdrawal. *R.*1:21-6(c)(2).

Disbursements made by bank transfer, such as electronic wire transfers, result in debit memos (See Section 4.11). Checks payable to a specific individual or entity require endorsement prior to negotiation. Both of these methods provide the necessary audit trail. Checks payable to "cash" do not.

Trust account disbursements may not be made by the use of postdated checks. The Advisory Committee on Professional Ethics has held that, except in real estate and related cases covered in *Advisory Opinion 454* (See Section 4.10):

> [I]t is improper for an attorney to issue any checks drawn upon an attorney's trust account until the instrument representing the funds against which the check or checks are drawn has in fact cleared. *Advisory Opinion 609*, 120 N.J.L.J. 1113 (December 10, 1987). (Appendix F).

The Supreme Court has also held that severe discipline, including disbarment, will be imposed upon attorneys who issue trust checks to accommodate clients.

> That the advance is drawn against the client's personal or business check makes no difference. The reason is that the attorney is gambling with his or her trust funds in the hope that the client's check will clear. Attorneys may draw against checks deposited in their trust accounts only in the limited circumstances of real estate or commercial closings in which the attorneys have received certified, bank, savings and loan, or cashier's checks. In the future, attorneys who improperly draw against other checks deposited in their trust accounts will run the risk of a more severe penalty, including disbarment. *In re Moras*, 131 N.J. 164, 170 (1993).

See the discussion in Section 4.10 on the "Uncollected Funds Doctrine".

Section 4.6 Legal Fees—Proper Method For Withdrawing

Chapter 5 will deal in more depth with the business accounting aspects of legal fees and related documents. However, since many legal fees are initially a part of trust monies that are deposited into the trust account (e.g., insurance and real estate settlement checks), it is necessary here to deal with the trust issues raised by accounting for legal fees.

*R.*1:21-6(a)(2) requires "all funds received for professional services" to be deposited to the attorney business account.

Therefore, all legal fees that come into the trust account must be disbursed through the trust account, usually by check payable directly to the attorney or law firm, which check must then be endorsed and deposited directly into the attorney business account. Under no circumstances is it ever proper for the attorney, even if justly due a legal fee, to make out a trust account check payable directly to a creditor of the attorney or for a personal expense. Thus, trust account checks payable for the attorney's office rent, office supplies, home mortgage, credit cards, and the like are improper and prima facie evidence of misappropriation of clients' trust funds. Legal fees may also be transferred electronically from the trust to the business account. Like all electronic transfers, it must be made on signed, written instructions from the attorney. The financial institution must then confirm the transaction by returning a document to the attorney showing the date, payee and amount of the transfer. *R.*1:21-6(c)(1)(A).

Moreover, attorney fees that are justly due and owing to the attorney may not remain in the trust account, but must be promptly withdrawn. Legal fees "should be withdrawn as soon as (the attorney) is entitled to do so by check payable only to (the attorney's) individual order." *In re Banner*, 31 N.J. 24, 28 (1959). As the Supreme Court has stated more recently:

> Attorney fees . . . should not remain in the trust account any longer than reasonably required by the circumstance. This avoids unnecessary commingling in the trust account and deceptive financial recording in the law firm's books. *In re Maran*, 80 N.J. 160, 162 (1979).

See also *In re Spevack,* 142 N.J. 272 (1997). The result of failing to promptly withdraw legal fees when due is that the attorney's fees are improperly, passively commingled with clients' trust funds.

The necessity for promptly removing legal fees from the trust account is also understandable by reference to Key Concept #5: Trust Accounting Is Zero Based Accounting (Section 2.5).

Before earned legal fees may properly be withdrawn from the trust account in any case, however, the client first "must be given notice" of the nature of the services rendered and the amount of the legal fee that is proposed to be paid to the attorney. *In re Stein*, 97 N.J. 550, 564 (1984). This requirement arises because RPC 1.15(c) instructs the attorney to account to the client for all trust monies and to afford the client an opportunity to "dispute" disbursements from the client's funds. A client cannot dispute a matter unless afforded notice of the attorney's proposed bill and disbursements. Therefore, the attorney should bill the client (or render an accounting) and give the client a reasonable opportunity thereafter to review it. Of course, where a contingent fee is charged the lawyer has a mandatory duty to furnish the client with a written closing statement. RPC 1.5(c) and *R.*1:21-7(g). If no objection to the proposed disbursement is received within a reasonable time, the attorney may withdraw the legal fee as proposed and deposit it to the business account. If, on the other hand, the client notifies the attorney of a dispute as to the fee, "the **portion in dispute** shall be kept separate (i.e. in the trust account) by the lawyer until the dispute is resolved." RPC 1.15(c) (emphasis added). The attorney should disburse the undisputed portion (e.g., to the client or to a third party as directed by the client). The attorney may not hold undisputed funds in order to coerce the client into accepting a proposed legal fee. Nor should the attorney simply hold the disputed portion of funds. Rather, the attorney should suggest a method (e.g., District Fee Arbitration Committee or Superior Court) by which the fee or other dispute can be resolved as quickly as possible.

Section 4.7 Handling Bank Charges

Sooner or later every attorney incurs a bank service charge. Whether the charge is for printing checks, a monthly service charge, the cost of issuing or receiving an electronic transfer, a returned deposit item, a returned check item or some other special charge, bank charges must be dealt with.

There are two ways to properly account for bank charges. The first is simply to arrange with the financial institution to charge another account (e.g., the business account or personal account) whenever a charge is incurred by the attorney trust account. For some practitioners this arrangement works fine, in which case there is no trust recordkeeping necessary, since the charges are not made to, but are handled outside of, the trust account. Occasionally, however, practitioners experience problems with this arrangement due to the normal turnover of banking personnel when a new manager forgets (or was never told) to charge a business or personal account for check printing charges and so the attorney trust account is assessed.

A second method eliminates any problem of bank personnel turnover and gives the attorney more complete control. That method calls for the attorney to prepare a Client Trust Ledger (Figure 16) showing the attorney as the "client" and the matter as "Bank Charges." The attorney then deposits a "reasonably" small amount of personal money in the trust account and reflects it on the ledger card marked for "Bank Charges." Charges are then recorded and written off against the ledger as they are incurred. When the running balance on that ledger sheet becomes low, a new, small deposit of personal funds is made to bring the balance up to

a comfortable level. The Random Audit Program has adopted a standard of $250 as the maximum amount "reasonably sufficient" to pay bank charges.

This second procedure might appear to be commingling of the attorney's personal funds with trust funds of clients. While that is true, it is also true that this is a recognized exception to that general prohibition and is specifically authorized by our Supreme Court under RPC 1.15(a), which provides, inter alia:

> Funds of the lawyer that are reasonably sufficient to pay bank charges may, however, be deposited therein. [See also *In re Banner*, 31 N.J. 24, 28 (1959)].

CLIENTS' TRUST LEDGER FOR BANK CHARGES

JOHN A. LAWYER
NAME OF CLIENT

FILE OR CASE NUMBER

BANK CHARGES
LEGAL MATTER OR ADVERSE PARTY

DATE	DESCRIPTION OF TRANSACTION	CHECK NO.	FUNDS PAID	FUNDS RECEIVED	BALANCE
3/08	Deposit Personal Funds			$ 250.00	$ 250.00
21/08	Summit Bancorp - Cost of Wire Transfer Re: Burtol Corp. - C492	Debit Memo	$ 7.50		$ 242.50
31/08	Monthly Service Charge - Summit Bancorp	Bank Statement	$ 5.75		$ 236.75
	THIS PRO FORMA CLIENT'S TRUST LEDGER SHEET MUST BE MAINTAINED WITHIN THE CONTEXT OF R. 1:21-6(c)(1)(B) **EACH CLIENT FOR WHOM TRUST FUNDS ARE BEING HELD REQUIRES PREPARATION OF A SEPARATE LEDGER SHEET**				

FIGURE 16 — BANK CHARGES TRUST LEDGER

Section 4.8 Interest and Investing Trust Funds

There is no court rule, caselaw, advisory opinion or rule of professional conduct that imposes an ethical obligation on an attorney to earn interest for the benefit of clients. In fact, clients' funds are often nominal in amount or held for such a short period of time that it is not cost effective for the attorney to place them in an interest bearing account. Thus, there is no general duty to invest. Rather, earning interest on clients' funds is a matter of contract between the attorney and client. Indeed, under the Supreme Court's IOLTA Program (Section 3.4) all clients' funds that are nominal in amount or held for a short duration must be deposited in an IOLTA Attorney Trust Account with interest paid to the IOLTA Fund, since it would not be cost effective to try and collect interest on these funds for individual clients. Nevertheless, the attorney always has the right to earn interest for a client. When the amount of money held is large and/or when the period for which clients' monies will be held is a long one, prudence may dictate either that the attorney place the funds in an interest-bearing trust account for the benefit of the client or indicate in writing to the client that the lawyer will not do so. This latter suggestion avoids unnecessary acrimony at the conclusion of a matter.

In New Jersey, an attorney may ethically invest funds of a client held in trust in an interest-bearing account. In *Advisory Opinion 326* (Appendix F) three specific guidelines were laid down as prerequisites in the investment decision:

(1) The attorney should either "obtain the consent of the client before investing the funds or . . . notify him of such investment at the time the action is taken."

(2) "[A]ny such investment must be undertaken with the greatest of care and only the most secure investments, such as in governmentally-insured bank accounts, should be made."

(3) "[A]ny interest or accretion is the property of the client." *[99 N.J.L.J. 298 (April 8, 1976)].*

To these three guidelines, a fourth must be added:

(4) "Funds shall be . . . maintained in a financial institution in New Jersey." RPC 1.15(a)

"Financial institutions" include federal or state chartered banks, savings and loan associations, credit unions and savings banks. Non-bank money market funds are an inappropriate vehicle for client trust funds. *Advisory Opinion 574*, 116 N.J.L.J. 353 (September 12, 1985). This is true even if such a fund branch office is in fact located in New Jersey. Non-bank money market funds are simply not guaranteed as to principal. These rules govern where the attorney alone has the responsibility of investing client funds.

However, the Supreme Court's Advisory Committee on Professional Ethics has noted an exception to these general rules. Where all interested parties direct the investment, such as an escrow or down payment provision in a contract for sale of real estate, for example, those funds may be placed in a U.S. Government securities fund or other fund that would not qualify as a depository for general clients' trust funds. *Advisory Opinion 574 Supplement*, 116 N.J.L.J. 721 (December 5, 1985). In order to protect the attorney and the parties, the direction on investment must be reduced to writing and be signed by all interested parties. Moreover, our Supreme Court has stated unequivocally that the attorney's breach of any fiduciary obligations with respect to escrow funds will be treated just like breaches relating to client trust funds:

> The parallel between escrow funds and client funds is obvious. So akin is the one to the other that henceforth an attorney found to have knowingly misused escrow funds will confront the disbarment rule of *In re Wilson*, (citation omitted). *In re Hollendonner*, 102 N.J. 21, 28 (1985).

Specific interest-bearing trust accounts are commonly available. They are often established by creating a separate interest-bearing trust account for a particular client transaction. This separate interest bearing format has been frequently used in the past for the sake of simplicity, since the interest earned does not have to be apportioned among multiple trust clients as would be the case if the attorney's entire Attorney Trust Account was interest bearing. All interest earned from the day of its creation until the date of disbursement (a) is calculated for the attorney by the financial institution and (b) belongs solely to the client. Moreover, as stated in Section 3.7, the separate account is set up using the client's social security or taxpayer identification number so that all tax information (e.g., Form 1099) is reported and includable on the client's tax return without involving the attorney.

In response to modern business needs, increasing numbers of financial institutions are now offering interest on general (i.e., common) trust checking accounts (See Section 3.3). While this sounds like a no-lose situation, many attorneys have discovered that, in fact, a number of these general interest-bearing trust checking accounts are simply too good to be true. The quagmire in which an attorney who blindly embraces such an account often finds herself, relates to the problem of apportionment of interest. When it comes to actually paying out trust monies to the client, the attorney (or secretary or bookkeeper) must take a considerable amount of time and "attempt" to calculate the amount of interest earned for all funds that were on hand for that client from day of deposit to day of disbursement and clearance at the financial institution. When only one deposit is made and one check written, this may not seem so difficult. But multiply the number of deposits or disbursements along the way and the geometric dimensions of the bookkeeping problem can easily be seen. Furthermore, to properly allocate interest one must consider the float period (i.e., the client's money is still earning interest until the trust check is paid by the financial institution). This raises the further problem of allowing an appropriate per diem interest allocation from the day the check is tendered until the day the

check clears the attorney trust account in the normal course of business. With all of these problems, it is no wonder that many attorneys have declined to participate in general interest-bearing trust accounts.

As computer technology has grown, however, another series of interest-bearing trust accounts have emerged based on the concept of sub-accounts. One such account is referred to in *Advisory Opinion 537*, 114 N.J.L.J. 68 (July 19, 1984) (Appendix F) as a "Super Now Account." A principal feature of that account is that each client is given a separate sub-account number that is placed on all deposits and disbursements, thus permitting the financial institution (rather than the attorney) to calculate interest for each individual client. The financial institution also supplies the attorney with a monthly bank statement that separately indicates the interest earned by each client. [Note that all interest earned on these non-IOLTA accounts must be posted from the bank statements to the receipts book as well as to the individual client ledgers]. As indicated by the Advisory Committee on Professional Ethics, however, such accounts create additional ethical problems of confidentiality that must be addressed by the attorney.

One question that has arisen is to whom does the interest earned on an attorney trust account belong? As the Advisory Committee makes clear "[A]ny interest or accretion is the property of the client." *Advisory Opinion 326*, 99 N.J.L.J. 298 (April 8, 1976) (Appendix F). An attorney is not entitled to a one or two percent charge for administration. Moreover, an attorney who unauthorizedly uses the interest is guilty of misappropriation of clients' trust funds, just as if it was the principal that was misappropriated. *In re Goldstein*, 116 N.J. 1 (1989); *In re Sorensen*, 122 N.J. 589 (1991). So long as there was advance disclosure to and consent by the client, however, it would be permissible to credit any interest earned against the fee charged. However, where the money on which interest is earned is not all the client's money, such as where an attorney receives and deposits a personal injury settlement check in the trust account, a portion of which belongs to the law firm as a contingent fee, both the client and the attorney are entitled to interest on the portion of the deposit that belongs to each, from day of deposit to day of distribution and bank clearance. *Advisory Opinion 582*, 117 N.J.L.J. 394 (March 27, 1986).

Section 4.9 Stopping Payment On Trust Checks

The Advisory Committee on Professional Ethics has considered the specific issue of "whether an attorney who has issued a trust account check covering the balance of proceeds due to the seller (in a real estate matter) may ethically stop payment after the closing statement was duly approved by all parties and attorneys, for the reason that his client, the buyer, upon taking possession claimed he found defects in the building." The Committee answered the inquiry in the negative in *Advisory Opinion 384*, holding that:

> It is the opinion of this Committee that where parties to a closing agree that the closing obligations have been met and that the monies shall be paid, it is ethically improper to stop payment on the attorney's trust check issued to sellers. Closing funds received upon approval of all parties to distribute must be promptly accounted for and turned over to the persons agreed upon in the absence of a court order to the contrary. [100 N.J.L.J. 1217 (December 29, 1977)] (Appendix F).

For any other situation, an attorney is best protected by securing an emergent order to show cause by a judge who may authorize the stop-payment. Unilateral action by the attorney without court direction may subject an attorney to an ethics grievance.

Section 4.10 Uncollected Funds Doctrine

As stated in Key Concept #2: You Can't Spend What You Don't Have (Section 2.2). Clients' monies are not available to be spent until they are "collected" and credited to the attorney trust account. This is the doctrine of uncollected funds which states that, if you disburse trust monies from your trust account after you have deposited monies on behalf of a particular client, but before these particular monies have cleared the banking process and have been credited to your trust account, you are improperly drawing on (i.e., using) funds that belong to other trust clients. This is an unethical practice that was specifically addressed in *Advisory Opinion 454*, 105 N.J.L.J. 441 (May 15, 1980) (Appendix F). There, the Advisory Committee on Professional Ethics was specifically asked "whether it is ethical for an attorney to deposit funds belonging to a client in the attorney's trust account and to make immediate disbursement from this fund on behalf of the client." The Committee answered the question in the negative:

> Drawing on trust funds for . . . purposes, such as the disbursement of the settlement proceeds of a negligence case, regardless of whether certified, cashier's or bank checks have been deposited but have not yet cleared, is not proper.

To this universal and general rule the Committee did carve out one exception:

> [L]imited strictly to real estate or commercial closing transactions representing the consummation of an agreement resulting in transfer of property or interests in property whether they be real estate, personal property or a combination of both, including sales of business where it is either essential or commercially desirable that trustee checks be issued against certified, bank or cashier's checks that have not cleared.

That exception now generally provides that it is **not** unethical to draw against uncollected "bank, savings and loan (state or federal), cashier's or certified checks" in real estate or commercial property closings. **NOTICE TO THE BAR**, *Amendment to Ethics Opinion 454*, 114 N.J.L.J. 110 (August 2, 1984). That holding was reaffirmed by the Supreme Court in *In re Moras*, 131 N.J. 164 (1993).

The term "bank check" has been defined by the legislature as follows:

A bank check means "a negotiable instrument drawn by a state or federally chartered bank, savings bank or savings and loan association on itself or on its account in another state or federally chartered bank, savings bank or savings and loan association doing business in this State." *N.J.S.A.* 17:11C-22k.

A "certified check" has been defined as:

A depositor's check recognized and accepted by (the) bank officer as (a) valid appropriation of the amount specified and as drawn against funds held by (the) bank. *Black's Law Dictionary* (4th Ed. 1957) page 287.

The Uniform Commercial Code notes further that a "certified check" means a check that is accepted by the bank on which it is drawn. *N.J.S.A.* 12A:3-409.

The term "cashier's check" is used to denote:

A form of a check by which the bank lends its credit to the purchaser of the check, the purpose being to make it available for immediate use in banking circles.

***

A bill of exchange drawn by a bank upon itself, and accepted by the act of issuance. *Black's Law Dictionary, supra*, page 301. See also *N.J.S.A.* 12A:3-412.

In recent years the banking industry has developed another type of check now in common usage. This document is called an "Official Check". In *Advisory Opinion 687* (Appendix F) the committee was asked whether official checks may be drawn upon and disbursed immediately upon deposit. The committee pointed out that this term does not appear in any New Jersey or federal statute and, therefore, has no settled legal definition. Rather, it appears that this title was simply created by financial institutions themselves. The Committee, thus, held that:

> Consequently, it is not possible to issue a ruling of general application endorsing or barring disbursement from deposits of such checks, or to give blanket approval to (such) instruments. . . .

The committee concluded that it is the actual substance of the check itself, not the label, that must control. To avoid disciplinary violations, immediate disbursal of such a negotiable instrument must be the virtual equivalent of collected funds. Immediate disbursement can take place only in the following circumstances:

(1) The check must be drawn by a licensed banking institution on itself or another such banking institution.

(2) The attorney must ascertain that the funds from the check will be made available by the depository bank no later than the next business day after the day of deposit.

Compliance with the uncollected funds doctrine announced in *Advisory Opinion 454* falls initially, and primarily, on the purchaser's attorney, who must be sure that the client has available sufficient "collected" funds to consummate a real estate closing. Where the attorney is a member of a large firm whose trust account has sufficient "collected" funds of other clients, the attorney may accept bank, savings and loan (state or federal), cashier's or certified checks from a client or a lending institution and draw on other clients' collected funds in order to have her attorney trust account check certified. However, in a small firm there may not be sufficient excess "collected" funds of other clients in the trust account on which to draw for the benefit of a particular real estate client. It must be noted that *Advisory Opinion 454* only authorizes the attorney to draw against **collected** funds of other clients if they are available. It does not (and cannot) require a financial institution to give an attorney immediate credit against deposited checks, whether they be certified or cashier's checks, for example. In fact, most financial institutions will not allow immediate drawing, but will require at least one day before the funds are "collected." Consequently, the small firm practitioner must make sure that the client's (e.g., the purchasers) deposit in the trust account has sufficient funds that can be "collected" by the time of closing. Funds can be wired from the client's account to the attorney trust account or, if certified funds are presented, they must be deposited in time to clear. Purchasers should be advised, however, that brokerage accounts and money market funds are not the equivalent of cash, and probably will be required five to ten days in advance of closing in order to be

liquidated and wire-transferred or certified. Note that some financial institutions have special forms that may be completed to achieve next day availability of bank checks, certified checks or cashier's checks.

The legislature has given attorneys a tool to facilitate real estate closings. Attention is directed to *N.J.S.A.* 17:11C-22k which was adopted in 1998. That statute requires covered mortgage bankers or brokers giving first mortgage loans on residential properties to: (1) present a certified check, cashier's check, teller's check or bank check for the proceeds of the first mortgage loan, (2) arrange an electronic transfer for the proceeds of the loan, or (3) provide for payment by cash to the closing agent at a reasonable time and place **prior to** the time of the mortgage closing transaction. While the purchaser can be charged a reasonable fee for this service, receipt of funds in time to be "collected" is a step that can only help the attorney to comply with *Opinion 454.*

In fact, unless the attorney routinely has large trust balances of collected funds of other clients, electronic transfers or cash are the only monies that an attorney may immediately draw against. Where other clients' collected funds are available, the attorney can obtain the mortgage check together with a certified check from the purchasers for the difference between the purchase price and the deposit together with the new mortgage amount. Attorney trust checks can then be written against these funds. Invariably, however, small adjustments will need to be made for water readings or fuel adjustments at closing. These can usually be handled by cash or small personal checks written directly from purchaser to seller. Of course personal checks are still subject to collection.

In representing the seller, the attorney is always looking for cash or its equivalent. Again, electronically transferred funds, either directly from the purchaser or the purchaser's attorney, are acceptable. So too, is the practice of the seller's attorney requiring the purchaser's attorney's trust account check to be certified as a condition precedent to authorizing the buyer's attorney to record the deed. Accepting an uncertified attorney's trust account check will not permit the seller to use those funds immediately. Additionally, such a practice subjects the seller to the possibility that the purchaser's attorney trust check may be dishonored if an item deposited to that trust account fails to clear. This is an unacceptable risk that should not be assumed. The fact is that an attorney trust account check itself is not a special banking instrument.

The Advisory Committee on Professional Ethics has held that the use of postdated attorney trust checks is not an ethical method for disbursing trust funds.

> The Supreme Court has been especially sensitive to the matter of attorney recordkeeping and bank accounts, particularly attorney trust accounts. R.1:21-6. The real hazard lies in the fact that the instrument may be dishonored or fail to clear for any one of a variety of reasons, and in such case the postdated check will, when presented, result in a draft upon the funds of others or, if such funds are not available, be itself dishonored. *Advisory Opinion 609*, 120 N.J.L.J. 1113 (December 10, 1987) (Appendix F).

While this opinion deals with personal injury settlements, it would appear by its language to cover all types of situations where postdated checks might be used.

> Accordingly, we hold that it is improper for an attorney to issue any checks drawn upon an attorney's account until the instrument representing the funds against which the check or checks are drawn has in fact cleared. *Id.*

Clearly, real estate closings routinely require prearrangement by counsel on both sides in order that all adjustments are worked out in advance so that sufficient monies are "collected" to fund the transaction. Only in this way can compliance with *Advisory Opinion 454* be successfully accomplished.

Section 4.11 Electronic Fund Transfers

Speed in the transfer of funds is always a concern. Improvements in computerization have led to the practical use of electronic fund transfers, which permit cash transfers of funds from one account to another. This procedure may be especially helpful in real estate transactions in order to comply with *Advisory Opinion 454* (See Section 4.10).

Electronic transfers are of two types: outgoing and incoming. Outgoing electronic transfers are initiated by the attorney to send attorney trust account funds to a third party or to another of the attorney's accounts. Incoming electronic transfers are initiated by a third party to forward funds into the receiving attorney's trust account.

Electronic fund transfers include, but are not limited to, wire transfers and computer transfers. *R.*1:21-6(c)(1)(A) imposes special obligations on the attorney or law firm in these cases. Whether the electronic transfer is initiated in person, by phone or by computer, it is essential that an attorney authorize each transfer. Where the transfer is outgoing from an attorney trust account, the attorney must first provide the financial institution with a signed, written instruction authorizing the transfer and showing the account number, date, payee and the amount. This procedure provides a clear audit trail for the funds and prevents non-lawyer staff

from handling trust monies without the knowledge and approval of the lawyer. For this reason an attorney must authorize each outgoing electronic fund transfer in writing. A blanket authorization covering all future transfers and naming the attorneys authorized does not comply with the rule requirement.

For outgoing wire transfers, most financial institutions use a written outgoing electronic wire transfer request form (Figure 17). This authorization is acceptable under *R.* 1:21-6 provided it is actually signed by the attorney. Phone authorization is not sufficient. The easiest way to meet the obligation is for the attorney to sign and fax or hand deliver the outgoing wire transfer request form to the branch office. The financial institution is then required to confirm each authorized transfer by returning a document to the attorney showing the date of the transfer, the payee and the amount. Usually this will take the form of a debit memo (Figure 7). Computer transfers of funds must also be preceded by a writing signed by the attorney and faxed to the financial institution, which must then provide the attorney with a debit memo confirming the date, payee and amount. In this way, the attorney maintains full control over the handling of clients' trust funds.

Incoming wire transfers require no specific action by the attorney to initiate the transfer, since these funds are being deposited into the attorney's account. However, the receiving attorney should advise her financial institution in advance to expect receipt of an electronic fund transfer in a specific amount from a named institution. Moreover, the attorney must always require confirmation from the financial institution, preferably in writing or by fax, before drawing on those incoming funds. Where the attorney is the recipient, rather than the initiator of a wire transfer, a credit memo (Figure 5) is issued to the attorney on the day the electronic transfer is received.

The cost of electronic fund transfers varies from financial institution to institution. Some institutions impose service charges for both outgoing and incoming transfers. These are reflected on debit memos (Figure 7). Other institutions charge only for outgoing wire transfers. Fees are generally in the $10.00 to $25.00 range.

There are two factors that determine the speed of an electronic fund transfer. The first factor is whether or not the sending and receiving banks are members of the Federal Reserve System (or other electronic fund transfer payment network). If they are, then an electronic fund transfer can usually be accomplished in one banking day. If they are not, several days may be involved. The best thing to do is to check with your institution in each instance. To be prudent, electronic fund transfers should, if possible, be initiated one full banking day before the funds are actually needed, even if both the sending and receiving institutions are members of the same system or network.

The second factor that affects the speed with which the electronic fund transfer process takes place is the status (i.e., collectibility) of the funds in the account of the sending party. If a cash deposit is made to the sending party's account, then the funds can be electronically

transferred almost immediately. If the account contains other sufficient collected funds, the electronic transfer can also be made immediately. In any other circumstances where checks (even certified or cashier's checks) have been recently deposited, however, these funds must first be collected by the depository financial institution before the sending party will be allowed to draw on them. Thus, if it is necessary to deposit checks drawn on another bank in order to make an electronic fund transfer, the attorney should check with the financial institution in advance to determine their policy as to how many days will be needed before the funds are treated as collected. In some cases, where the attorney is well known to the institution and/or the deposited check is either a certified or cashier's check, the financial institution may authorize an electronic transfer of the funds after it has received "provisional" (but not final) credit for the check through the Federal Reserve System. This is not the usual case, however, and unless the attorney is properly drawing on cash or sufficient collected funds in the trust account, an advance call for directions is required.

One final caveat is in order. Electronic fund transfers are not infallible, despite the fact that these electronic transfers represent state-of-the-art activities. Transfers can get lost (temporarily) in the system. Occasionally, in such circumstances the transfer may be recalled by the sending party and the funds reissued in the form of a certified or cashier's check. Sometimes, however, the lost funds cannot be recalled because they cannot be found for some period of time. If electronically transferred funds are lost, the correct procedure calls for both the sending and receiving parties to put a trace on the funds through their respective financial institutions. If the funds cannot be found in time, a real estate transaction, for example, will either have to be held in escrow (i.e., a "dry" closing) or postponed until the money is located or a bridge loan may have to be secured temporarily.

FIGURE 17 — WIRE TRANSFER REQUEST FORM

FIRST UNION

Wachovia Bank, National Association
f/k/a
First Union National Bank

Funds Transfer Request

For Use by CMG Field Personnel Only (not for branch use)

Preparer's Signature

Authorized Signature

Account Status

Sufficient (Audio Checked)
Not Sufficient (NSF)

NSF Only

Callback Required (Yes or No)

s/ John A. Lawyer, Esq.
Initiator's Signature

NSF Source of Funds

Customer Accepting Call Back/Phone Number

Credit Approver Name (Please Print)

s/ Mary Banker
Verifier's Signature

Date Time of Call

Funds Transfer

Current Date: August 14, 2008

Control Number

Domestic or International	Non-Repetitive or Repetitive	Line Number	Amt Verify Cd	Verify I.D.	Type (Fed, Book, Other)
Domestic	Non-Repetitive				

Caller	Branch or Department	Request Type (Fax,Phone,Walk-in)
John A. Lawyer, Esq.	Brunswick Ave.	FAX

Description 2 (GL) | Executive Date | **Domestic Transfer Amount**: $175,480.25

Type Currency | Value Date | Foreign Amount | Exchange Rate

Contract Number / Provided By

U.S. Dollar Amount: $ | **Int'l Transfer Amount**: $

Originator

Name: John A. Lawyer, Esq. | Org | Account Number: 0002315031200

Address: 15 Elm Street

City: Anywhere | State: NJ | Zip | Country

Receiving Bank

Name: 1st National Bank of Texas | R/T Number: 210200001

Address: 2040 Banker's Row

City: Dallas | State: Texas | Zip | Country

Advice
(No Phone Advice Required, Credit and Phone Advice, Notify and Pay, Pay Upon Proper I.D.)

Beneficiary Payment Information

Name: Mary Lou King | Org | Account Number: 940002539

Address: 411 Whatever Street

City: Dallas | State: Texas | Zip | Country

Other Payment Information

Funding for King Real Estate Closing on August 16, 2008

Fee Method
(Waive/Charge)

Customer Contract

All of the above information is complete, correct and provided to First Union for the purpose of instructing First Union to transmit a funds transfer. First Union's acceptance and execution of the funds transfer is subject to the terms and conditions on the reverse side of this form. My signature below indicates that I have received a completed copy of this Funds Transfer Request.

s/ John A. Lawyer, Esq.
Customer Signature

August 14, 2008
Date

0000 538053 (25/pkg Rev 01)

Section 4.12 Retention Period For Trust Records

New Jersey's recordkeeping rule requires that all mandated bookkeeping records for the trust account must be maintained "for seven years after the event which they record." R.1:21-6(c)(1) and RPC 1.15(a). Insofar as the trust account alone is concerned, the retention requirement encompasses:

- Trust Checkbook;
- Trust Checkbook Stubs;
- Trust Receipts Book;
- Trust Disbursements Book;
- Clients' Trust Ledgers;
- Bank Statements;
- Prenumbered, cancelled checks and debit memos;
- Duplicate deposit slips or deposit receipts and credit memos;
- Electronic funds transfer authorizations and confirmations;
- Monthly reconciliation work sheets; and
- Those portions of clients' case files reasonably necessary for a complete understanding of the financial transactions pertaining thereto.

Generally, all attorney trust records retained are required to be originals. However, where financial institutions provide attorneys with proper digital images of bank records, those records may satisfy the attorney's obligations. Financial institutions providing digital images must include no more then two checks per page (front and back). Financial institutions must also maintain all digital images for a period of seven years. *R.*1:21-6(b).

Section 4.13 Special Purpose Trust Accounts

Trust accounting is extremely flexible within the parameters established by R.1:21-6 and *R.*1:28A. It can accommodate the occasional practitioner with a minimum of volume, to the sole practitioner who grosses $500,000, to the small to medium firm with $1,000,000 gross revenue, to the large 50 plus person firm. Attorneys can have as much, or as little, sophistication as their practices dictate in a particular discipline or disciplines.

We have already reviewed the special purpose individual interest-bearing trust account (Section 4.8), which is traditionally used where the attorney and client agree that the clients' money should bear interest. This happens, for example, where a large amount of trust money is being held for a period of time sufficient to generate interest in an amount that exceeds the cost of establishing such account. There are other situations, however, relating more to the nature of the legal work undertaken and its volume, which may indicate the establishment of a separate special purpose trust account.

One instance where these accounts have been found useful is where an attorney handles a large collection law practice. Particularly where the attorney represents a large client, such as Macy's or Sears Roebuck & Co., handling all of their collection work in a given geographical area, a separate trust account is helpful. The help comes in the form of additional control over all of that particular client's matters. This method also gives the attorney greater accountability to the client since all the work goes through a single account. Moreover, there is no possible confusion with other clients' matters due to their separateness. A separate specific trust account is also often established when representing a large real estate developer, so that the many individual transactions handled by the attorney are recorded completely and in a single location. These accounts can easily be established as interest bearing for the benefit of the client, since they all relate to the single client. Remember that, if these accounts are not set up as interest bearing for the benefit of the client, they must be established as IOLTA accounts (Section 3.4) so that any interest generated is paid to the IOLTA Fund.

Section 4.14 Practical Suggestions

Over the years a number of helpful suggestions have been made by auditors from the Random Audit Compliance Program. None of them are mandatory, nor are they applicable to every practitioner. Since they have been found to be helpful by a number of attorneys, however, they deserve thoughtful consideration.

- If an attorney is having too many problems with staff mistakenly making deposits to the business account rather than the trust account, or vice-versa, consider having each set of deposit slips printed in a different color. If the financial institution does not offer this service, (a) keep trust slips in one drawer and business slips in another, or (b) simply use a magic marker to mark a different colored stripe on each set of slips.

- If an attorney is having similar problems where a check is written on the business account instead of the trust account, or vice-versa, use different colored checks for each account.

- If an attorney has a number of trust accounts, or both a business and trust account, at the same financial institution and the institution is miscrediting

deposits or improperly charging checks from one account to another account, consider maintaining some accounts at different financial institutions.

- Monthly reconciliations listing clients and their current balances on the client ledger sheet should be distributed to the firm attorney to whom each client is assigned. This way if the matter is concluded, but either the full legal fee has not been withdrawn or there is a small balance, the attorney in charge will recognize that fact and can expeditiously attend to and zero-out the client ledger in accordance with Key Concept #5 (Section 2.5).

- Where separate (usually interest bearing) trust accounts are established for separate clients, in order to keep track of all funds in a single centralized location, a separate colored client ledger card should be inserted at the back of the general attorney trust account ledger.

Section 4.15 Trust Property Other Than Cash

Occasionally an attorney-client relationship calls for an attorney to take possession of non-cash trust property, such as securities, coins or jewelry. All of the usual duties that an attorney owes to clients on account of cash trust property (Section 1.1) are similarly owed when other trust property is received. In addition, the attorney has the following responsibilities:

A. Duty To Identify

The attorney must promptly label the item so that trust property can be easily identified as property of the client and not confused with either the attorney's own property or with that belonging to other clients. RPC 1.15(a).

B. Duty To Safeguard

The attorney has the duty to see that other trust property is "appropriately safeguarded." RPC 1.15(a). This means that as to securities, for example, they should be kept in a safe deposit box, except when the particular circumstances warrant some other form of safekeeping. Discipline has been imposed in a variety of situations for violation of the duty to safeguard clients' non-cash property. See *In re Grubb*, 99 Wash.2d 690, 633 P.2d 1346 (1983) (attorney lost a client's ring given as security for legal fees); *People v. Scudder*, 197 Colo. 99, 590 P.2d 493 (1979) (lost will); *The Florida Bar v. Carlton*, 366 So.2d 406 (Fla. 1978) (failure to maintain insurance policies in a safe place).

Section 4.16 Trust Account Overdraft Notification

All financial institutions approved as depositories for attorney trust funds (Section 3.2) are required, as a condition of such approval, "to report to the Office of Attorney Ethics in the event any properly payable attorney trust account instrument is presented against insufficient funds, irrespective of whether or not the instrument is honored." *R.*1:21-6(b).

The primary purpose of overdraft notification is to detect serious trust account violations. It should be recognized that the creation of an overdraft, if adequately explained, does not per se indicate a misappropriation of clients' trust funds. Overdrafts can arise from a number of causes, such as a bank encoding error or the failure to timely credit a deposit to the trust account. The purpose of the overdraft notification procedure is, through documentation, to differentiate these situations from one where an attorney is misappropriating client's trust funds.

Normal banking practice requires the financial institution to give notice to the attorney simultaneously with the notice of overdraft to the Office of Attorney Ethics. Where there is no impropriety, the attorney will be as interested as anyone in finding the cause for the overdraft as quickly as possible.

On receipt of the overdraft notice, the Office of Attorney Ethics will communicate in writing with the attorney or law firm, requesting a written, documented response that explains the overdraft within ten (10) business days of the attorney's receipt of this letter. In many instances, the attorney will already have communicated with the financial institution and will have determined and corrected the error resulting in the overdraft.

The initial inquiry by the Office of Attorney Ethics is a disciplinary request and, in accordance with court rules, a response by the attorney is required. The failure to respond is serious and may potentially result in a motion for the attorney's temporary suspension. Most overdraft notices are handled by responses from the attorney properly documenting the cause of the overdraft. If further information is necessary to supplement the attorney's initial response, it will be requested. Closing letters are sent by the Office of Attorney Ethics where the attorney's response is satisfactory.

One of the most frequent causes of overdrafts relates to a failure to **timely** deposit trust monies. This can be remedied by adherence to Key Concept #2: You Can't Spend What You Don't Have (Section 2.2), and Key Concept #3: Timing Is Everything (Section 2.3). Checks drawn against uncollected funds should not cause an overdraft to be reported. However, if a deposit is not made so that a closing check, in a real estate matter, for example, is presented by the seller or realtor on a banking day prior to the deposit (assuming there are no other trust funds in the account), an overdraft has to occur. Several things can (and should) be done to try and prevent these overdrafts:

- deposit funds promptly so they are credited promptly. (See Key Concepts #2 and #3), and

- specifically advise the individuals to whom checks are issued (e.g., client, seller, realtor) that they must withhold presenting checks issued after the close of the banking day until the lawyer has a reasonable opportunity to deposit monies and have them credited on the next banking day.

Section 4.17 Unidentified and Unclaimed Trust Funds

Three situations have been identified by the Random Audit Program as causing unresolvable problems for attorneys:

- Missing Owners—cases where lawyers know to whom trust funds belong, but the owners cannot be found;

- Unclaimed Trust Funds—cases where lawyers know to whom trust funds belong, but the owners fail or refuse to claim them;

- Unidentifiable Trust Funds—cases where the ownership of trust funds has become impossible to determine due to the passage of time (e.g. the merging of law firms).

Maintenance of these funds, like all small inactive balances, hinders the reconciliation process, since these odd amounts of funds must be carried from month to month. Rule 1:21-6(j) provides a procedure for disposing of these funds by payment to the Clerk of the Superior Court. In order to do so, funds must be unidentified or unclaimed, or the owners must be missing, for over two years. The lawyer must then make a "reasonable" search to ascertain the facts over a period of one year. If the funds remain unidentified or unclaimed, or if the missing owners cannot be found or will not accept the funds, the lawyer, at the end of that year, may make application to the Clerk of the Superior Court to accept them. The application must be accompanied by a check in the amount of the funds in question and an affidavit of inquiry demonstrating the reasonableness of the search, inquiry and notice.

Section 4.18 Computerized Recordkeeping

Computers are routinely supplanting manual accounting records because of their flexibility and multi-write data entry benefits. The New Jersey recordkeeping rule specifically authorizes the use of computerized records "provided they otherwise comply with (the rule) and provided further that printed copies and computer files in industry standard formats can be made on demand." *R.* 1:21-6(d).

The Judiciary does not endorse any particular computer software package as being in compliance with *R.* 1:21-6. Each practitioner who has read this work, and who understands the stated principles of trust and business accounting, is in a position to decide for herself the merits and degree of compliance of an individual software package. Any such package must contain the very same elements present in the manual system outlined. The Random Audit Compliance Program has viewed several such programs that comply with *R.* 1:21-6.

One of the primary caveats applicable to all computer data is the concern about losing the data that has been stored. The disks on which the computerized accounting data is stored should be backed-up on a daily or weekly basis. The back-up information should also be stored off site to avoid being destroyed by the same event (*e.g.*, a fire) that also destroys the primary computer.

CHAPTER 5 — CREATING ATTORNEY BUSINESS ACCOUNTS

Section 5.0 Who Must Maintain Business Accounts

Attorneys who engage in the private practice of New Jersey law are required to maintain an attorney business account in a New Jersey financial institution. "**Every** attorney who practices (privately) in this state shall maintain in a financial institution in New Jersey . . . a business account into which all funds received by professional services shall be deposited." (Emphasis Added). *R.*1:21-6(a). *See also R.*1:28A. These bank accounts are required as a condition precedent to the right to engage in the private practice of law in this state. *R.*1:21-6(a) (Appendix A).

No distinction is made based upon frequency of New Jersey practice in the state, so that those who practice full time are not required to keep more detailed records, for instance, than part-time or occasional practitioners. Rather, all attorneys—full-time, part-time or occasional—must maintain the same basic bank accounts and records specified in *R.*1:21-6. These accounts, however, are not required to be maintained in the form of checking accounts. For the "occasional" practitioner to comply with the rule, it is suggested that savings accounts be used with a minimum deposit of personal funds *(e.g.,* $50) sufficient to keep the accounts open and to avoid service charges. Some financial institutions impose no monthly service charges for savings accounts; however, other institutions impose a minimal monthly charge. Naturally, should legal fees be received, it may be necessary at that time to open traditional business checking accounts. An "occasional" practitioner is defined on the Annual Attorney Registration Statement as one who practices New Jersey law for less than five percent of the time.

The Supreme Court of New Jersey suspended an attorney from practice for three months for failing to maintain a separate attorney business account. Instead, in order to avoid levies by creditors (including the IRS) on his business account, the attorney intentionally deposited personal and legal fees into the trust account. The Court held that such conduct not only violated the recordkeeping rules but, also, defrauded the government and creditors. *In re Olitsky,* 149 N.J. 27 (1997).

The Advisory Committee on Professional Ethics has held that where an attorney's income is derived exclusively as salary from a corporate employer, the attorney need not maintain those funds in an attorney/business account. *Advisory Opinion 124,* 91 N.J.L.J. 108 (February 15, 1968) (Appendix F). Requiring a separate business account in these circumstances would be "a needless duplication and unnecessary burden, serving no purpose in helping the court to correct a situation which sometimes occurs in the traditional attorney-client relationship". The committee also held, however, that "(i)f independent clients are represented from time to time, separate records for these cases should be kept as prescribed by the rule in question". The Advisory Committee also held in that opinion that income unrelated to the practice of law, such

as that received from teaching, as an insurance broker, as a real estate agent or for rendering accounting services should not be deposited into an attorney business account.

The Supreme Court has made clear that attorneys and law firms that have out-of-state offices must maintain trust and business accounts in order to practice New Jersey law. The Court first spoke to this issue in 1977 in the case of *In re Jaffe,* 74 N.J. 86 in the case of a Pennsylvania lawyer who had a "very limited" private practice in New Jersey. See also *In re White,* 24 N.J. 522 (1959).

Subparagraph (f) of *R.*1:21-6 spells out the applicability of this rule to out-of-state lawyers and law firms practicing in this State:

> Attorneys Practicing With Foreign Attorneys or Firms.
>
> All of the requirements of this rule shall be applicable to every attorney rendering legal services in this state regardless whether affiliated with or otherwise related in any way to an attorney, partnership, legal corporation, limited liability company, or limited liability partnership formed or registered in another State.

In a case of first impression nationwide, the Supreme Court imposed disciplinary responsibility on the national law firm of Jacoby & Meyers for violation of subparagraph (f). That law firm operated several South Jersey branch offices but failed to process clients' trust funds received in connection with New Jersey legal matters through a New Jersey trust account. Instead, all funds went into the firm's Pennsylvania trust account. As a consequence, the law firm was reprimanded and assessed disciplinary costs. *In re Jacoby & Meyers,* 147 N.J. 374 (1997).

Section 5.1 Location Of and Responsibility For Maintaining Business Accounts

All business accounts must be maintained only "in a financial institution in New Jersey." *R.*1:21-6(a) (Appendix A) and RPC 1.15(a) (Appendix B). One of the purposes of this requirement is "to facilitate [the] Court's supervisory control over the practice of law in this state." *In re Jaffe*, 74 N.J. 86, 90 (1977). Since subpoena power is confined by state boundaries, the disciplinary system's ability to secure records would be seriously curtailed if business accounts were permitted to be maintained outside of this state.

The maintenance of proper business accounts and records is the personal responsibility of each attorney admitted. *In re Rabb*, 73 N.J. 272, 277 (1977). One attorney cannot avoid disciplinary action based upon the assertion (even if *bona fide*) that it was a partner who had total firm responsibility and control over the records. *In re Shamy and Pincus*, 59 N.J. 321 (1971). Also, *In re Carmichael*, unreported (2002). As noted in Section 3.8 regarding trust accounts, attorneys may hire bookkeepers and accounts to assist in the accounting process, but

it is the lawyer who has ultimate responsibility for proper recordkeeping. In this regard, all partners and shareholders have an equal responsibility to keep business (and trust records) in the event of dissolution of a partnership or a professional corporation. *R.*1:21-6(e) provides that they "shall make appropriate arrangements for the maintenance by one of them or by a successor firm of the [required] records . . . ." It is perhaps best for all concerned to memorialize such "arrangements" in writing.

Section 5.2 Authorized Depositories For Business Accounts

Only New Jersey "financial institutions" are authorized to hold attorney business accounts. That term has been defined to include banks, savings and loan associations, credit unions and savings banks.

Unlike depositories for attorney trust accounts, however, financial institutions do not have to pre-qualify in order to hold attorney business accounts. This is because attorney business accounts were not included in the "Overdraft Notification Amendment" of *R.*1:21-6(b). (See Sections 3.2 and 4.16). Consequently, attorneys have full choice of depositories for attorney business accounts from all financial institutions in the state.

Section 5.3 Business Account Defined

The nature of an attorney business account is as different from the nature of an attorney trust account as night is from day. With a trust account, an attorney holds monies of others that have been entrusted to the attorney's care. An attorney business account, on the other hand, is defined as a personal account of the lawyer or law firm that has been specifically created in order to account for "all funds received for professional (legal) services." *R.*1:21-6(a)(2). The business account is comprised of the attorney's own money that has been earned solely from the practice of law. Since in a business account the attorney is dealing with the lawyer's own money, the strict proscriptions that apply to trust funds are inapplicable. Thus, if an attorney places personal funds not earned in the practice of law into a business account, it does not constitute the ethical violation of commingling trust funds with personal funds. Similarly, while writing a trust check directly to a department store to pay a personal obligation of the attorney would be *prima facie* evidence of misappropriation of clients' trust funds, such a practice is proper when the check is written from the business account, since the attorney has the right to spend personal money in any manner.

Nevertheless, in order to facilitate the Supreme Court's supervisory control over the practice of law by insuring proper accountability by attorneys to clients, there are some specific rules governing the establishment and proper maintenance of business accounts.

Section 5.4 Account Names

Business accounts must be established only in the name of an attorney or law firm. *R.*1:21-6(a). Actually, there are four choices depending upon the nature of the attorney's employment. The business account must be established in the name of:

- the attorney;
- a partnership of attorneys;
- a professional corporation of which the lawyer is a member; or
- the attorney or partnership of attorneys.

Section 5.5 Proper Signatories

Since the business account contains the attorney's own funds, the task of authorizing disbursements need not be restricted solely to the attorney. A non-lawyer secretary or bookkeeper may ethically prepare and sign business checks. While the wisdom of such a practice may be questioned, this action is within the discretion of each attorney. However, good accounting practice would dictate that the same person who signs checks not be the same person who also maintains business and trust account records.

Section 5.6 Required Account And Document Designations

In order to facilitate the identification and distinction between trust and business funds, business accounts must be "prominently designated" under *R.*1:21-6(a) as either:

(1) "Attorney Business Account"

or

(2) "Attorney Professional Account"

or

(3) "Attorney Office Account"

Likewise, source documents, such as checks (regular, starter and counter) and deposit slips, must also have the identical chosen designation. The rule also requires that the signature card and title of the account bear the same designation. With respect to checks and deposit slips, the operative words in the rule are "prominently designated." The words "Attorney Business Account" can be either printed, pre-printed, stamped or typed. Likewise, the words need not appear at any specific location so long as they are "prominent".

CHAPTER 6 — ACCOUNTING FOR ATTORNEY BUSINESS FUNDS

Section 6.0 Business Accounting In A Nutshell

Following is a brief synopsis of the black letter law of attorney business accounting. Each item is dealt with in depth in subsequent sections.

I. Who Must Maintain A Business Account (Section 5.0)

Every attorney who practices New Jersey law privately in this state, whether full-time, part-time or occasionally, must maintain an attorney business account. This requirement applies equally to out-of-state lawyers or law firms that are properly authorized to practice law in New Jersey.

II. Location of Business Accounts (Sections 5.1 and 5.2)

Attorney business accounts must be maintained **only in New Jersey**, but financial institutions do not have to pre-qualify as depositories, as they do where trust accounts are concerned.

III. Account Names (Section 5.4)

Business accounts must be established in the name of (a) the attorney, (b) a partnership of attorneys, (c) a professional corporation of which the attorney is a member or (d) the attorney or partnership of attorneys by whom the lawyer is employed.

IV. Proper Signatories (Section 5.5)

Either an attorney or a non-lawyer may prepare and sign business account checks.

V. Required Designations (Section 5.6)

All attorney business accounts, as well as all checks and deposit slips, must be prominently designated as either (a) "Attorney Business Account", (b) "Attorney Professional Account" or (c) "Attorney Office Account".

VI. The Mechanics Of Business Accounting (Section 6.1)

Proper business accounting requires familiarity with the following three items:

A. Business Checkbook

While not a source document, the business checkbook must be carefully maintained. All checkbooks, checkbook stubs, prenumbered, canceled checks, duplicate deposit slips and bank statements must be retained. A general running balance of the checkbook should always be maintained.

B. Business Receipts Book

An appropriate receipts book must be maintained showing the record of all deposits to the business account, specifically identifying the date, source and description of each item deposited.

C. Business Disbursements Book

An appropriate disbursements book must be kept showing the record of all withdrawals from the business account, specifically identifying the date, payee and purpose of each disbursement.

VII. What Must And Must Not Go Into An Attorney Business Account (Section 6.2)

A. Mandatory Receipts

(1) All legal fees received for professional services.

B. Permissive Receipts.

(2) General retainers for legal services where no explicit understanding has been reached with clients that they will be separately maintained.

(3) Advances for costs.

(4) Funds of the lawyer that are reasonably sufficient to pay bank charges.

C. Prohibited Receipts

(5) All mandatory attorney trust receipts.

(6) Trust funds held by an attorney in a specified fiduciary capacity, such as executor, guardian, trustee or receiver, or in any other similar fiduciary capacity.

(7) Other income of the attorney not arising from legal practice.

VIII. Reconciliations (Section 6.4)

Each attorney must perform a monthly business account reconciliation, showing reconciliation of the cash balance derived from the cash receipts and cash disbursements totals, the checkbook balance and the bank statement balance.

IX. Bank Charges (Section 6.5)

Bank charges may be assessed directly against the attorney business account.

X. Interest (Section 6.6)

Since the business account represents the attorney's earned legal fees, the attorney may earn and retain interest on the funds contained in that account.

XI. Retention Period For Business Records (Section 6.7)

All records required to be maintained under *R.*1:21-6 must be maintained for a period of seven years after the event that they record.

XII. Required Ancillary Business Records (Section 6.8)

Attorneys are required to maintain and retain the following ancillary business records:

(a) copies of all retainer and compensation agreements with clients, including:

(i) written statements as to the basis or rate of the fee in all cases where a client has not been regularly represented by the lawyer,

(ii) contingent fees in any matter where a client's claim for damages is based upon the alleged tortious conduct of another,

(iii) all other cases involving contingent fees, and

(iv) all agreements for legal services in connection with matrimonial actions;

(b) copies of all statements to clients showing disbursements to them or on their behalf, including:

(i) recovery statements for tort matters where a contingent fee has been charged, and

(ii) recovery statements for all other matters involving contingent fees;

(c) copies of all bills rendered to clients;

(d) copies of records showing payments to attorneys, investigators or other persons, not in their regular employ, for services rendered or performed, and

(e) records of legal fees shared with other attorneys, including:

(i) fee sharing by members, associates and employees of out-of-state firms, and

(ii) fee sharing by attorneys associated with out-of-state attorneys.

XIII. Special Purpose Business Accounts (Section 6.9)

Volume and type of practice often require an attorney to maintain more than one business account. Two of the most common special-purpose business accounts are: Cost Accounts and Payroll Accounts.

IX. Misappropriation of Law Firm Funds

The knowing misappropriation of law firm funds is equivalent to the knowing misappropriation of clients' trust funds. Disbarment is virtually automatic.

Section 6.1 The Mechanics Of Business Accounting

Business accounting is virtually identical to trust accounting, only simpler. Under *R.* 1:21-6, complete compliance with business accounting responsibilities requires familiarity with only three items:

- Business Checkbook
- Business Receipts Book
- Business Disbursements Book

A. Business Checkbook

Since this item is identical to the Trust Checkbook covered in Section 4.1A, there is no need to deal further with the matter here, except to point out that all checks must be prenumbered and must be issued in sequence.

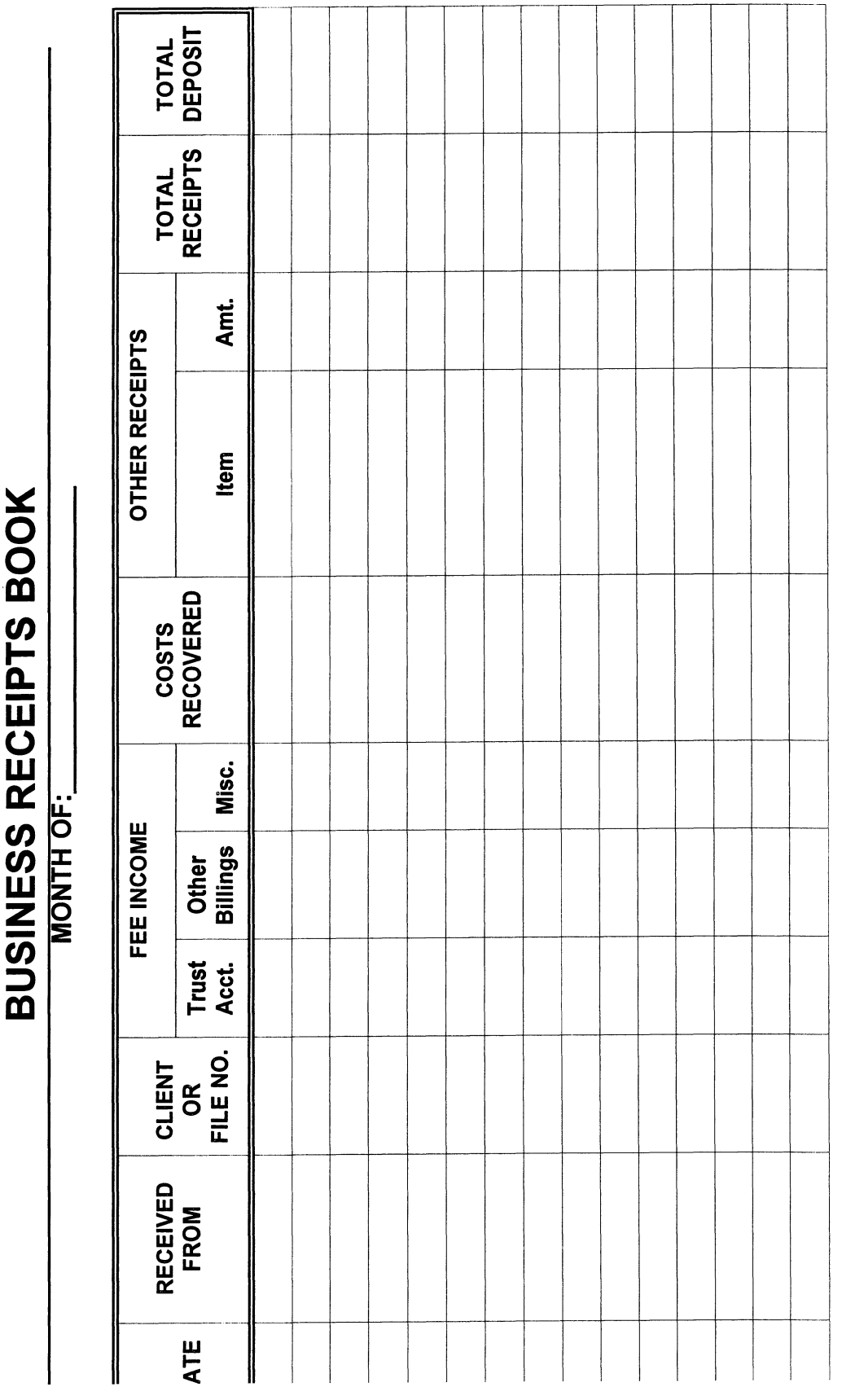
B. and C. Business Receipts and Disbursements Books

As was said in the chapter on "Trust Accounting" (Sections 4.1B and C), a receipts book is nothing more than a chronological listing of every deposit made—here to the business account. Conceptually, a yellow legal pad would serve the purpose! From the point of view of "generally accepted accounting practice", however, a bound book (or journal) that gives these records some permanency is the required form. *R.*1:21-6(c). Figure 18 shows a sample page of a Business Receipts Book. Note that, in accordance with the concept of descriptiveness, a place for the following basic information is provided:

- date,
- source,
- client name or matter, and
- amount.

The various categories shown in Figure 18 are only samples. The purpose of categorization here lies in its usefulness for income tax purposes, as well as for the attorney's own financial management. The best rule to follow is to check with an accountant initially at the time books and records are first set up and be guided by the accountant's advice.

FIGURE 18 — BUSINESS RECEIPTS BOOK



In the sample Business Receipts Book, all legal fees withdrawn directly from the trust account are recorded under the heading "Trust Account", while "Other Billings" would be reserved for payments by clients made directly to the attorney as the result of periodic monthly billings, for example. The "Misc." category could be utilized to account for referral fees received from other attorneys. "Costs Recovered" and "Other Receipts" are self-explanatory. The "Total Receipts" for each matter are placed under that heading, with the total of all receipts that are deposited on a given day being shown in the final column entitled "Total Deposit".

Similarly, and in line with this same concept, the disbursements book also contains a chronological listing of each and every disbursement made from the business account. Figure 19 shows a sample page of a Business Disbursements Book. The sample contains a place for the following information, in accordance with the concept of descriptiveness:

- date,
- payee,
- purpose, and
- amount.

Figure 19 contains various columns to reflect "Costs Advanced", any weekly draws taken by the attorney ("Drawing Account"), "Salaries" paid to secretaries and associates, expenses incurred in connection with "Travel" and the proverbial "Other" expense category. Again, these categories are merely suggestions. The firm's accountant should be consulted initially at the time records are set up so that the information recorded is as useful as possible for income tax preparation. As noted in the correlative trust section, each and every deposit and disbursement (including bank memos and charges) must be scrupulously recorded and for the same reasons. Additionally, the business receipts and disbursements books allow the attorney to look at your business activity on the macro-level—the big picture. If the attorney adds up all the deposits shown in the business receipts book for a particular month, the attorney will see how much money was earned (*i.e.*, grossed) during that period, a very interesting figure indeed. Likewise, if the attorney adds up all the business disbursements for a month, the attorney will also be very interested to know how much money has been spent on the business (assuming, of course, all such expenses were paid directly and solely from that account) during that period.

Section 6.2 What Must And Must Not Go Into An Attorney Business Account

The following is a summary of the rules regulating what receipts must, may, and must not, be deposited into an attorney's business account.

A. Mandatory Receipts

(1) All legal fees "received for professional services" must be deposited in the business account. *R.*1:21-6(a)(2).

B. Permissive Receipts

(2) General retainers for legal services may be deposited in the business account in cases where no explicit understanding has been reached with clients that they will be separately maintained. *In re Stern*, 92 N.J. 611, 619 (1983).

(3) Advances for costs that are received from clients may be deposited either directly into the attorney business account or into the attorney trust account. *In re Stern*, 92 N.J. 611, 619 n.2 (1983). [But see Section 6.9A].

(4) "Funds of the lawyer that are reasonably sufficient to pay bank charges" may be deposited into the attorney business account. Cf. RPC 1.15(a).

C. Prohibited Receipts

(5) All mandatory attorney trust receipts set forth in Section 4.2A, by definition, must **never** be deposited into the business account.

(6) Trust funds held by an attorney in a specified fiduciary capacity, such as "executor, guardian, trustee or receiver" must be separately maintained. *R.*1:21-6(a)1; *In re Herr*, 22 N.J. 276 (1956).

(7) Other income of the attorney not arising from legal practice should not generally be placed into the business account (except, of course, for a small amount reasonably necessary to pay bank charges, as stated under (4). The rationale for this was stated by the Advisory Committee on Professional Ethics thusly:

> One of the prime objectives of the . . . rule is to assist an ethics committee to determine if a proper accounting has been made to a client. Accordingly, only monies received in connection with the practice of law should be deposited in the business account required by this rule. Income received from teaching, as an insurance broker, as a real estate agent or for rendering accounting services, is

> not received from the practice of law and therefore should not be deposited in such business account.
>
> *Advisory Opinion 124*, 91 N.J.L.J. 108 (February 15, 1968) (Appendix F).

In essence, this opinion underlines the accounting need to segregate legal fees from all other income of the attorney. Such segregation enables the attorney to quickly and clearly render a proper accounting of clients' legal fees.

FIGURE 19 — BUSINESS DISBURSEMENTS BOOK

BUSINESS DISBURSEMENTS BOOK

MONTH OF:__________

DATE	PAID TO	CHECK NO.	AMOUNT OF CHECK	COSTS ADVANCED		DRAWING ACCOUNT	SALARIES	TRAVEL	OTHER	
				Client	Amt.				Amt.	Item

FIGURE 20 — BUSINESS ACCOUNTING FLOW CHART

BUSINESS ACCOUNTING FLOW CHART

Step 1: Legal Fees are Received or Disbursed by Attorney

LEGAL MATTER OR CASE

⇓

Step 2: Source Documents
(a) Deposit Slip or Check is prepared and
(b) Entered in Checkbook

BUSINESS DOCUMENT IS PREPARED

⇓

Step 3: Books of Original Entry
(a) Business Receipts Book
(b) Business Disbursements Book

RECORD THE TRANSACTION IN BOOK (JOURNAL)

Section 6.3 Putting It All Together

We have looked separately at each of the three items that comprise the basics of attorney business accounting. Now we shall see how they fit together to form an integrated, business accounting system.

The flow chart on the previous page shown as Figure 20 will help an attorney to visualize the sequence in which these items are entered on the various components of the business accounting system.

For example, let's say that a $2,500 check for a retainer in a divorce matter is received by the attorney (Step 1). The attorney then prepares the source document, a deposit slip (Step 2), physically makes the deposit at the bank and receives the duplicate deposit slip date-stamped "received." The attorney enters this information in the Business Checkbook (Step 2). Finally, the deposit information is entered chronologically in the Business Receipts Book (Step 3).

Set forth below in Figure 21 is a simple key to show the business documents on which one records deposit and disbursement information.

FIGURE 21 — BUSINESS ENTRY KEY

BUSINESS RECORDS	ENTER DEPOSITS	ENTER DISBURSEMENTS
A. BUSINESS CHECKBOOK	X	X
B. BUSINESS RECEIPTS BOOK	X	
C. BUSINESS DISBURSEMENTS BOOK		X

Section 6.4 Reconciliation — The 2-Way Check

The reconciliation principles and rationale are the same for business accounting as for trust accounting (Section 4.4). The application of those principles is even easier, however, since only three documents are involved.

Based on the model double-entry bookkeeping system, a full reconciliation and balancing requires a review and analysis of the three documents as shown in Figure 22. By this process:

(1) the balance of all business receipts and disbursements is reconciled to the business checkbook balance, and

(2) the business checkbook balance is then reconciled with the balance on the business bank account statement.

STEP NO. 1

The very first step in any reconciliation process is to obtain a correct beginning balance. You can never reconcile an account unless you know the correct balance that you should have on hand. If the attorney opens a new business account, the first time the account is reconciled the beginning balance will be zero. The beginning balance for each succeeding period for which a reconciliation is prepared will necessarily depend on the prior reconciled balance being correct. This requires any discovered errors to be resolved. If the attorney is not sure that the beginning business balance is correct, the attorney should consult a bookkeeper or an accountant. Carrying an incorrect balance only compounds the problem, as time makes finding and correcting the errors more and more difficult.

STEP NO. 2

The second step in the reconciliation process is to add up all items for the monthly reconciliation period that have been recorded in the Business Receipts Books (Figure 18). The same total is then compiled for the Business Disbursements Book (Figure 19). Both of these figures are placed on the Business Receipt/Disbursements Control Sheet (Figure 23), together with the beginning balance. Then the total of legal fees received is added to the beginning balance. From the resulting figure, the total amount disbursed is subtracted. This results in a new balance figure. It is this figure that will form the bedrock of the reconciliation process. That figure is also entered in the appropriate place on the Two-Way Reconciliation Sheet (Figure 24).

STEP NO. 3

Enter the amount of the balance in the Business Checkbook in the appropriate place on the Reconciliation Sheet. Compare the amount of the Receipts/Disbursement Control Sheet Balance to the Business Checkbook balance. They must be equal.

STEP NO. 4

List on the Reconciliation Sheet all outstanding checks and deposits (also called deposits in transit) that are not reflected on the latest monthly bank statement for the reconciliation period. Add the outstanding checks to the Business Checkbook Balance and place that amount in the place indicated on the Reconciliation Sheet. Subtract from that figure all outstanding deposits and place that amount opposite the entry titled "Business Checkbook Reconciliation Balance". Insert the Bank Statement Balance on the Reconciliation Sheet.

STEP NO. 5

Compare the Reconciliation Balance to the Bank Statement Balance—they must be equal.

Congratulations! If both figures are equal, you have successfully and correctly reconciled the business account! If there is a difference between the two figures, roll up your sleeves, call in your bookkeeper or check with an accountant. Whatever you do, do not ignore the problem. Figures that do not reconcile only get more difficult and more expensive to reconcile with time.

Section 6.5 Bank Charges

Since the business account represents the attorney's earned legal fees, it is wholly appropriate to have bank charges assessed against that account. As noted in Section 4.7, many attorneys also make arrangements with banks to automatically assess all charges incurred in connection with the trust account against the business account. This is an acceptable method of handling bank charges for both accounts.

Section 6.6 Interest

Since earned legal fees are the property of the attorney, interest may be earned on business account funds. All such earned interest is the property of the attorney.

FIGURE 22 — TWO-WAY RECONCILIATION SCALE

Two-Way Reconciliation Scale

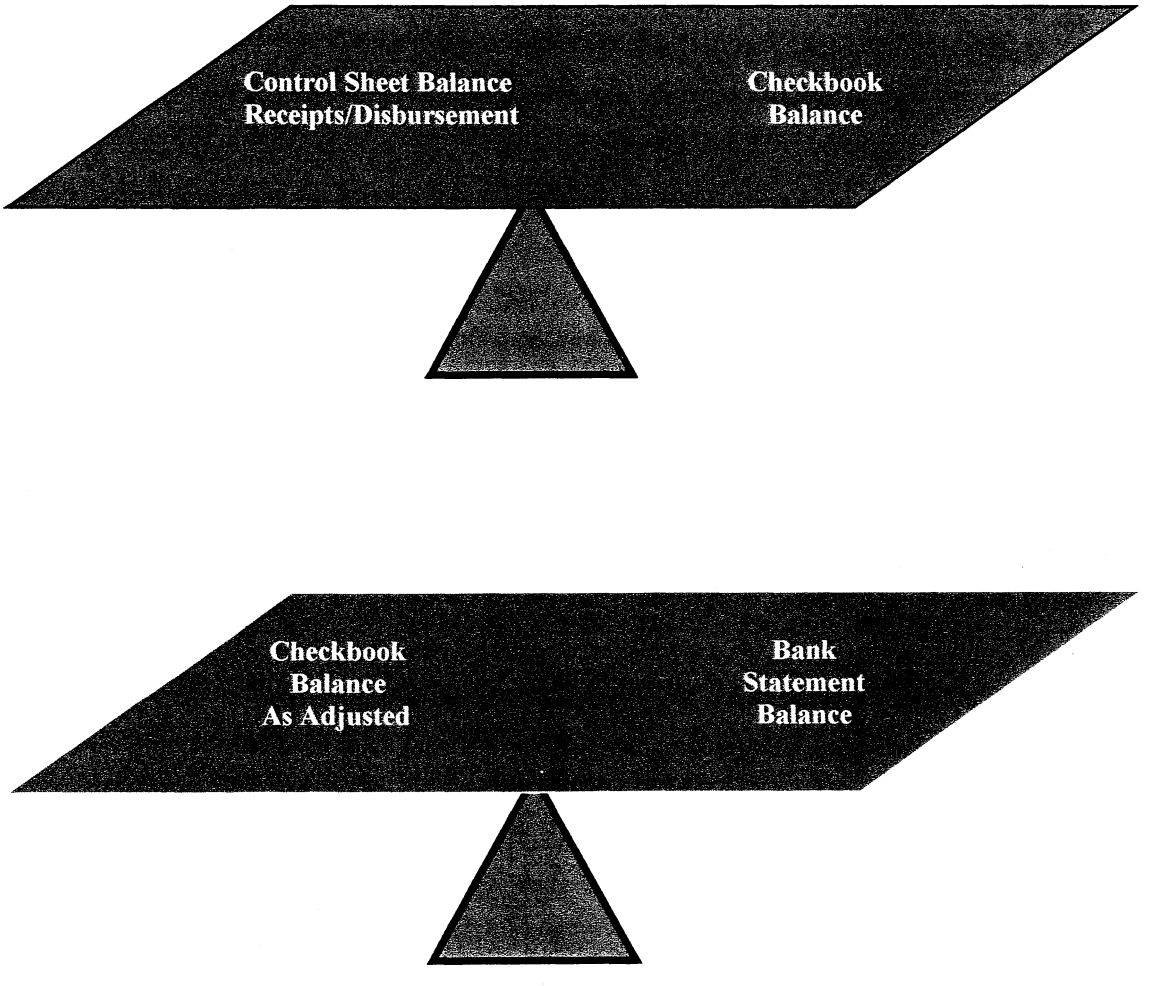


FIGURE 23 — BUSINESS RECEIPTS/DISBURSEMENTS CONTROL SHEET

BUSINESS ACCOUNT
RECEIPTS/DISBURSEMENTS CONTROL SHEET

FOR 20__

MONTH	LEGAL FEES		BALANCE
	RECEIVED	DISBURSED	
JANUARY			
FEBRUARY			
MARCH			
APRIL			
MAY			
JUNE			
JULY			
AUGUST			
SEPTEMBER			
OCTOBER			
NOVEMBER			
DECEMBER			
TOTALS			

FIGURE 24 — BUSINESS TWO-WAY RECONCILIATION SHEET

BUSINESS RECONCILIATION SHEET

As of the month ended

_____ 20____

Receipts/Disbursements Control Sheet Balance		$_____*
Business Checkbook Balance		$_____*
Add: All Outstanding Checks	$_____	
Less: All Outstanding Deposits	$_____	
Business Checkbook Reconciliation Balance		$_____**
Bank Statement Balance		$_____**

*These amounts must be identical to each other.

**These amounts must agree with each other.

Section 6.7 Retention Period For Business Account Records

New Jersey's recordkeeping rule requires that all mandated bookkeeping records for the business account be maintained "for seven years after the event which they record". *R.*1:21-6(c)(1). Insofar as the business account is concerned, the retention requirement encompasses:

- Business Checkbook;
- Business Checkbook Stubs;
- Business Receipts Book;
- Business Disbursements Book;
- Bank Statements;
- Prenumbered, canceled checks and debit memos;
- Duplicate deposit slips or deposit receipts and credit memos;
- Monthly reconciliation work sheets; and
- The portions of clients' case files reasonably necessary for a complete understanding of the financial transactions pertaining thereto.

As stated in Section 4.12 for trust accounts, financial institutions may provide attorneys with digital-imaged checks, rather than original cancelled checks, subject to limitations discussed in that section.

Section 6.8 Required Ancillary Business Records

In addition to the records directly related to the proper recordkeeping of the attorney business account, attorneys are required to maintain a number of ancillary records related to their fees. Most of these records are required under *R.*1:21-6(c)(1)(C) through (F).

(a) copies of all retainer and compensation agreements with clients, including:

(i) written statements as to the basis or rate of the fee in all cases where a client has not been regularly represented by the lawyer [RPC 1.5(b) - Appendix I],

(ii) contingent fees in any matter where a client's claim for damages is based upon the alleged tortious conduct of another [*R.*1:21-7(g)],

(iii) all other cases involving contingent fees [RPC 1.5(c) - Appendix I], and

(iv) all agreements for legal services in connection with family actions [*R.*5:3-5];

(b) copies of all statements to clients showing disbursements to them or on their behalf including:

(i) recovery statements for tort matters where a contingent fee has been charged [*R.*1:21-7(g)]

(ii) recovery statements for all other matters involving contingent fees [RPC 1.5(c) - Appendix I]

(c) copies of all bills rendered to clients, and

(d) copies of records showing payments to attorneys [See e.g., *R.*1:39-6(d) - Appendix H], investigators or other persons, not in their regular employ, for services rendered or performed.

Additionally, the following records of legal fees shared with other attorneys are also required to be maintained under *R.*1:21-6(f) and (g).

(e) fee sharing by members, associates and employees of out-of-state firms pursuant to RPC 1.5(e) (Appendix I), and

(f) fee sharing by attorneys associated with out-of-state attorneys.

Section 6.9 Special Purpose Business Accounts

Accounts and accounting records can be as sophisticated or as simple as an attorney wishes to make them. This flexibility allows for differences in types and volumes of legal practice.

A. Costs Account

Most attorneys incur costs or disbursements in representing clients. Some incur more costs than others, depending on the type of practice. Collection practitioners, for example, always incur court filing fees and service costs in addition to costs for docketing and executing on judgments. Litigators also incur court filing and service fees, in addition to costs for police reports, investigators, experts and the like. Real estate lawyers encounter fees with the county clerk (or register), the secretary of state, the municipal clerk and the local tax, sewer and water collector, just to name a few.

The cardinal business rule is not to advance your own monies if you do not have to. When you advance costs and disbursements you lose in two ways: (1) you are losing interest that your money could have earned and (2) you are losing other valuable opportunities that might be available if you were able to use the money you advanced for costs. Depending on the client and the case, sometimes the only way to get some good cases is to advance money for costs out of your own pocket. However, while the amount expended for costs in one case may seem small, if you do it in five or ten or fifteen cases, it adds up. So unless it is absolutely necessary, do not offer to advance costs. The best way to handle costs is as follows:

- **LARGE COSTS INCURRED**

If the amount of a particular cost that will be incurred is large, the cost of a real estate survey ($750), for example, or the cost of a medical expert report ($2,500), have the client pay the bill directly. This procedure serves the additional purpose of making the client keenly aware of the amount of costs as the matter proceeds. If the client thinks a particular cost is too high now, the client will certainly think it is too high later when you include it in your bill as a disbursement. Some attorneys offer the disgruntled client the opportunity to discuss a disbursement directly with the doctor or surveyor in order to attempt to reduce the cost. (It seems these discussions with experts are rarely successful but, at least if the issue is approached early-on and directly, the attorney is not stuck in the middle.)

- **SMALL COSTS INCURRED**

If the amount of costs expected to be incurred will be small, have the client give you an estimated amount in advance to cover these costs. Advances for costs is not required to be placed in the trust account, but may be deposited directly into the attorney business account to be expended when necessary. *In re Stern*, 92 N.J. 611, 619 n.2 (1983). For many practitioners this works just fine. However, whether you are able to secure advances for costs or whether you have to advance your own money initially, many practitioners find it convenient to write checks for costs in undetermined amounts. For example, in recording a deed with the county clerk or writing to the secretary of state for a copy of a document (where the exact number of pages must be known to exactly calculate the costs), the attorney will write a business account check marked "NOT GOOD FOR MORE THAN $100.00", leaving the amount blank. The difficulty these checks naturally present is that they make it impossible to keep an exact running balance or to reconcile the account accurately. The amount of the check is not immediately known. For this reason it is suggested that indeterminate trust checks not be used.

To enable the lawyer to maintain a running balance in the business account and still write business checks for indeterminate amounts, many lawyers set up a special separate business account, called a "Costs Account". This account is used exclusively to take care of costs that are expended on behalf of a client. If the client advances these costs to the lawyer, they are deposited into the Costs Account. If, on the other hand, the lawyer has to advance costs, a predetermined amount of the attorney's own money (say $500 or $1,000) is constantly

maintained in the Costs Account, and then disbursements are made from that account as the expenses for clients are incurred. If this procedure of establishing a Costs Account sounds strange to some, it should not. This is the exact type of account that most attorneys maintain with the Clerk of the Superior Court in Trenton to cover filing fees.

Attorneys should remember that, while "a lawyer may advance court costs and expenses of litigation," the lawyer is ethically prohibited from giving general "financial assistance to a client in connection with pending or contemplated litigation". RPC 1.8(e). An attorney may not pay a client's living expenses, such as rent or food. Neither may an attorney give the client a "draw" against an anticipated recovery. Loans to clients under these circumstances are similarly prohibited. *In re Block*, 189 N.J. 432 (2007).

B. Payroll Account

Just as a Costs Account provides the attorney with a more sophisticated method of accounting, so too does a separate "Payroll Account". A separate Payroll Account allows the attorney to regularly deposit monies that will be necessary to meet payroll expenses and to see how much more is needed at a glance. It also provides a satisfactory location for separately segregating and maintaining employee withholding taxes. It should be noted that employee withholding taxes do not ever belong in the attorney's trust account, since these monies arise out of the employer-employee, and not the attorney-client relationship. *Advisory Opinion 598*, 119 N.J.L.J. 505 (March 26, 1987) (Appendix F).

Employee withholding taxes must be segregated by attorneys at the time salaries are paid to employees. Furthermore, these sums must be maintained by attorneys intact. In the case of *In re Frohling,* 153 N.J. 27 (1998) an attorney was reprimanded for failing to keep employee withholding taxes intact and for making misrepresentations to his employees by issuing W-2 forms representing that payroll taxes had been withheld when that was not the case.

Section 6.10 Misappropriation of Law Firm Funds

Since 1983, the Supreme Court has held that disbarment was the appropriate discipline for an attorney who knowingly misappropriated in law firm funds over $25,000 over a period of three years. *In re Siegel*, 133 N.J. 162 (1993). The Court noted that, despite the differing relationship between lawyers and clients on the one hand and lawyers and their partners on the other, "misappropriation from the latter is as wrong as from the former."

In a decision authored by Chief Justice Deborah T. Poritz in 1998, the Supreme Court extended *Siegel* and applied the automatic *Wilson* doctrine of almost invariable disbarment to theft of law firm funds. The Court held that public confidence in the integrity and trustworthiness of lawyers requires no less. *In re Greenberg*, 155 N.J. 138 (1998).

CHAPTER 7 — ANCILLARY RECORDKEEPING AND FINANCIAL CONSIDERATIONS

Section 7.0 Annual Reporting Requirement

Every attorney who engages in the private practice of New Jersey law at all—whether full-time, part-time or occasional—must report on the Annual Attorney Registration Statement the primary attorney trust and attorney business accounts maintained pursuant to *R.* 1:21-6(a). The required information consists of the account number and the name of the financial institution. Associates and attorneys who enjoy "Of Counsel" status must report the appropriate accounts maintained by the law firm by which they are employed, unless they maintain accounts in their own names, in which case those accounts should be reported.

Section 7.1 Compliance Certification Requirement

New Jersey requires that all attorneys who engage in the private practice of New Jersey law make an annual certification that they have read *R.* 1:21-6 and *R.* 1:28A and their accounts "comply with" these rules. This compliance certification is incorporated into the question on the Annual Attorney Registration Statement regarding listing of the primary attorney trust and attorney business accounts. Attorneys must also certify that "the information is true and accurate" and that they realize that if "any statements are false (they are) subject to discipline by the Supreme Court." Discipline has been imposed in several states where an attorney falsely certified compliance with state trust and business account rules when such was not the fact. *In re Rubi*, 133 Ariz. 491, 652 P.2d 1014 (1982) (filing false certification on trust account); *In re Austin*, 333 N.W.2d 633 (Minn. 1983) (false certification that lawyer kept proper books).

Section 7.2 Availability of Records

Both trust and business account records are required to be located at the principal office of each New Jersey attorney or law firm. *R.* 1:21-6(d). The records and accounts so maintained must be made available for review under the following circumstances:

- records must be "available upon request for review and audit by the Office of Attorney Ethics." *R.* 1:21-6(h).

- records must be "available for inspection, checks for compliance with (*R.* 1:21-6) and copying . . . by [the Random Audit Compliance program of] the Office of Attorney Ethics." *R.* 1:21-6(d).

- records must be "produced in response to a subpoena duces tecum issued in connection with an ethics investigation or hearing". *R.* 1:21-6(h).

- records must be "produced at the direction of the Disciplinary Review Board or the Supreme Court." *R.*1:21-6(h).

All such records "remain confidential except for the purposes of the particular proceeding and their contents shall not be disclosed by anyone in such a way as to violate the attorney-client privilege." *R.*1:21-6(h). See also *R.*1:21-6(d). As to computerized records, *R.*1:21-6(h) also provides that "both the attorney or law firm and the (software) producers and licensors . . . shall be conclusively deemed to have consented to (its use) by disciplinary authorities. . . ."

Section 7.3 Loans To And From Clients

Loans to and from clients are a specific type of attorney-client business venture. As such, they present difficult ethical issues for the attorney, all of which will surely surface if the venture turns out not to be as profitable as the client anticipated.

Loans **from clients** seem to be made most often after the attorney receives funds for the client's benefit, such as a personal injury recovery or at the time estate monies are distributed to a beneficiary. Regardless of when the money is received, it must be categorically stated that a loan must never be made directly from the trust account payable to the attorney's order. The proper way to handle such a transaction is for the attorney to draw a trust account check to the client and have the client endorse the check back directly to the attorney. This method helps to protect the attorney and to counter a client's later claim that he did not realize fully that the attorney was getting the benefit of the money. Moreover, the proceeds of the loan by the client to the attorney should not find its way back into the attorney's trust account. This would constitute unethical commingling. Rather, the endorsed trust account check should be placed in the attorney's personal account.

Loans **from attorneys** must not come from the attorney trust account, since those loans must be from personal funds of the lawyer, not trust funds. Either the attorney's business account or the attorney's personal account should be utilized for this purpose.

The above discussion of course relates only to the methodology for loans to and from attorneys and clients. There are, however, very serious ethical considerations that come into play at the inception of any attorney-client business venture. RPC 1.8(a) states the general black letter rule that an attorney "shall not" deal with clients in business transactions. In order to ethically avoid that blanket proscription the attorney must establish in advance of the proposed transaction, that:

(1) the transaction **and** terms in which the lawyer acquires the interest are fair **and** reasonable to the client **and** are fully disclosed **and** transmitted in writing to the client in a manner that can be understood by the client,

(2) the client is advised in writing of the desirability of seeking **and** is given a reasonable opportunity to seek the advice of independent legal counsel of the client's choice concerning the transaction, **and**

(3) the client gives informed consent in a writing signed by the client, to the essential terms of the transaction **and** the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

For a further description and analysis of the caselaw interpreting DR 5-104 and DR 5-101 [the predecessors of RPC 1.8(a)], see "Attorney-Client Business Ventures", 103 New Jersey Lawyer (May 1983).

Section 7.4 Automatic Overdraft Privileges

Some financial institutions offer automatic overdraft privileges on certain checking and other accounts. In essence this means that whenever an account is overdrawn, a personal loan will be advanced and credited to the account. Automatic overdraft privileges are entirely proper in respect of an attorney business account, since the attorney is using solely personal monies. In respect of an attorney trust account, however, they are wholly improper. *R.*1:21-6(c)(3). The different result is warranted due to the fact that an attorney is not permitted to commingle personal funds (resulting from a personal loan or otherwise) into the trust account. Moreover, if the rules regarding timing (Section 2.3) and not drawing on uncollected funds (Section 2.2) are followed, there should not be an overdraft on the attorney trust account!

Moreover, the Supreme Court has disciplined attorneys for commingling trust and business account funds. *In re Olitsky,* 149 N.J. 272 (1997) (three month suspension); *In re Spevack,* 142 N.J. 272 (1997) (reprimand).

Section 7.5 Federal Cash Reporting Rule

Pursuant to 26 U.S.C. §6050I and 31 U.S.C. §5331, the Internal Revenue Service has promulgated regulations that require that anyone engaged in a trade or business (including attorneys) who receives more than $10,000 cash in one transaction or in two or more related transactions must report that fact. The report must be filed on a Form 8300 (Figure 25) within 15 days of the date of the transaction. The report must include the name, address, tax identification number of the payor, the amount, date received and the nature of the transaction. Thus, apparently, whether the cash is trust money or a legal fee earned by an attorney, a report must be made.

Additionally, whenever Form 8300 is filed, a second requirement provides that the payee must so inform the payor on or before January 31 of the year following the report, showing the name and address of the business receiving the cash, the amount and the fact that it is being

reported to the I.R.S. Additional explanatory information is provided on the reverse side of the form (Figure 25).

In addition to criminal penalties, significant discipline has been imposed in New Jersey for violation of this obligation. *In re Chung,* 147 N.J. 559 (1996) (1 ½ year suspension); *In re Khoudary*, 167 N.J. 593 (2001) (2 year suspension).

FIGURE 25 — IRS FORM 8300 — REPORT OF CASH PAYMENTS OVER $10,000

IRS Form 8300
(Rev. March 2008)
OMB No. 1545-0892
Department of the Treasury
Internal Revenue Service

Report of Cash Payments Over $10,000 Received in a Trade or Business

▶ See instructions for definition of cash.

▶ Use this form for transactions occurring after March 31, 2008. Do not use prior versions after this date.

For Privacy Act and Paperwork Reduction Act Notice, see page 5.

FinCEN Form 8300
(Rev. March 2008)
OMB No. 1506-0018
Department of the Treasury
Financial Crimes
Enforcement Network

1 Check appropriate box(es) if: a ☐ Amends prior report; b ☐ Suspicious transaction.

Part I Identity of Individual From Whom the Cash Was Received

2 If more than one individual is involved, check here and see instructions . . . . . ▶ ☐

3 Last name	4 First name	5 M.I.	6 Taxpayer identification number

7 Address (number, street, and apt. or suite no.)	8 Date of birth . . ▶ (see instructions) M M D D Y Y Y Y

9 City	10 State	11 ZIP code	12 Country (if not U.S.)	13 Occupation, profession, or business

14 Identifying document (ID)	a Describe ID ▶ ..... c Number ▶	b Issued by ▶ .....

Part II Person on Whose Behalf This Transaction Was Conducted

15 If this transaction was conducted on behalf of more than one person, check here and see instructions . . . . . ▶ ☐

16 Individual's last name or Organization's name	17 First name	18 M.I.	19 Taxpayer identification number

20 Doing business as (DBA) name (see instructions)	Employer identification number

21 Address (number, street, and apt. or suite no.)	22 Occupation, profession, or business

23 City	24 State	25 ZIP code	26 Country (if not U.S.)

27 Alien identification (ID)	a Describe ID ▶ ..... c Number ▶	b Issued by ▶ .....

Part III Description of Transaction and Method of Payment

28 Date cash received M M D D Y Y Y Y	29 Total cash received $ .00	30 If cash was received in more than one payment, check here . . . ▶ ☐	31 Total price if different from item 29 $ .00

32 Amount of cash received (in U.S. dollar equivalent) (must equal item 29) (see instructions):

a U.S. currency $ .00 (Amount in $100 bills or higher $ .00)
b Foreign currency $ .00 (Country ▶)
c Cashier's check(s) $ .00
d Money order(s) $ .00
e Bank draft(s) $ .00
f Traveler's check(s) $ .00

Issuer's name(s) and serial number(s) of the monetary instrument(s) ▶

33 Type of transaction

a ☐ Personal property purchased
b ☐ Real property purchased
c ☐ Personal services provided
d ☐ Business services provided
e ☐ Intangible property purchased
f ☐ Debt obligations paid
g ☐ Exchange of cash
h ☐ Escrow or trust funds
i ☐ Bail received by court clerks
j ☐ Other (specify in item 34) ▶

34 Specific description of property or service shown in 33. Give serial or registration number, address, docket number, etc. ▶

Part IV Business That Received Cash

35 Name of business that received cash	36 Employer identification number

37 Address (number, street, and apt. or suite no.)	Social security number

38 City	39 State	40 ZIP code	41 Nature of your business

42 Under penalties of perjury, I declare that to the best of my knowledge the information I have furnished above is true, correct, and complete.

Signature ▶ _____ Authorized official Title ▶ _____

43 Date of signature M M D D Y Y Y Y	44 Type or print name of contact person	45 Contact telephone number ( )

IRS Form 8300 (Rev. 3-2008) Cat. No. 62133S FinCEN Form 8300 (Rev. 3-2008)

Figure 25 — IRS Form 8300 — Report of Cash Payments Over $10,000 - Continued

IRS Form 8300 (Rev. 3-2008) Page **2** **FinCEN Form 8300** (Rev. 3-2008)

Multiple Parties

(Complete applicable parts below if box 2 or 15 on page 1 is checked)

Part I **Continued—Complete if box 2 on page 1 is checked**

3 Last name	4 First name	5 M.I.	6 Taxpayer identification number

7 Address (number, street, and apt. or suite no.)	8 Date of birth . . ▶ (see instructions) M M D D Y Y Y Y

9 City	10 State	11 ZIP code	12 Country (if not U.S.)	13 Occupation, profession, or business

14 Identifying document (ID)	a **Describe ID** ▶ ..... c **Number** ▶	b **Issued by** ▶ .....

3 Last name	4 First name	5 M.I.	6 Taxpayer identification number

7 Address (number, street, and apt. or suite no.)	8 Date of birth . . ▶ (see instructions) M M D D Y Y Y Y

9 City	10 State	11 ZIP code	12 Country (if not U.S.)	13 Occupation, profession, or business

14 Identifying document (ID)	a **Describe ID** ▶ ..... c **Number** ▶	b **Issued by** ▶ .....

Part II **Continued—Complete if box 15 on page 1 is checked**

16 Individual's last name or Organization's name	17 First name	18 M.I.	19 Taxpayer identification number

20 Doing business as (DBA) name (see instructions)	Employer identification number

21 Address (number, street, and apt. or suite no.)	22 Occupation, profession, or business

23 City	24 State	25 ZIP code	26 Country (if not U.S.)

27 Alien identification (ID)	a **Describe ID** ▶ ..... c **Number** ▶	b **Issued by** ▶ .....

16 Individual's last name or Organization's name	17 First name	18 M.I.	19 Taxpayer identification number

20 Doing business as (DBA) name (see instructions)	Employer identification number

21 Address (number, street, and apt. or suite no.)	22 Occupation, profession, or business

23 City	24 State	25 ZIP code	26 Country (if not U.S.)

27 Alien identification (ID)	a **Describe ID** ▶ ..... c **Number** ▶	b **Issued by** ▶ .....

Comments – Please use the lines provided below to comment on or clarify any information you entered on any line in Parts I, II, III, and IV

IRS Form 8300 (Rev. 3-2008) **FinCEN Form 8300** (Rev. 3-2008)

Figure 25 — IRS Form 8300 — Report of Cash Payments Over $10,000 - Continued

Section references are to the Internal Revenue Code unless otherwise noted.

Important Reminders

- Section 6050I (26 United States Code (U.S.C.) 6050I) and 31 U.S.C. 5331 require that certain information be reported to the IRS and the Financial Crimes Enforcement Network (FinCEN). This information must be reported on IRS/FinCEN Form 8300.
- Item 33 box i is to be checked only by clerks of the court; box d is to be checked by bail bondsmen. See the instructions on page 5.
- The meaning of the word "currency" for purposes of 31 U.S.C. 5331 is the same as for the word "cash" (See *Cash* on page 4).

General Instructions

Who must file. Each person engaged in a trade or business who, in the course of that trade or business, receives more than $10,000 in cash in one transaction or in two or more related transactions, must file Form 8300. Any transactions conducted between a payer (or its agent) and the recipient in a 24-hour period are related transactions. Transactions are considered related even if they occur over a period of more than 24 hours if the recipient knows, or has reason to know, that each transaction is one of a series of connected transactions.

Keep a copy of each Form 8300 for 5 years from the date you file it.

Clerks of federal or state courts must file Form 8300 if more than $10,000 in cash is received as bail for an individual(s) charged with certain criminal offenses. For these purposes, a clerk includes the clerk's office or any other office, department, division, branch, or unit of the court that is authorized to receive bail. If a person receives bail on behalf of a clerk, the clerk is treated as receiving the bail. See the instructions for Item 33 on page 5.

If multiple payments are made in cash to satisfy bail and the initial payment does not exceed $10,000, the initial payment and subsequent payments must be aggregated and the information return must be filed by the 15th day after receipt of the payment that causes the aggregate amount to exceed $10,000 in cash. In such cases, the reporting requirement can be satisfied either by sending a single written statement with an aggregate amount listed or by furnishing a copy of each Form 8300 relating to that payer. Payments made to satisfy separate bail requirements are not required to be aggregated. See Treasury Regulations section 1.6050I-2.

Casinos must file Form 8300 for nongaming activities (restaurants, shops, etc.).

Voluntary use of Form 8300. Form 8300 may be filed voluntarily for any suspicious transaction (see *Definitions* on page 4) for use by FinCEN and the IRS, even if the total amount does not exceed $10,000.

Exceptions. Cash is not required to be reported if it is received:

- By a financial institution required to file Form 104, Currency Transaction Report.
- By a casino required to file (or exempt from filing) Form 103, Currency Transaction Report by Casinos, if the cash is received as part of its gaming business.
- By an agent who receives the cash from a principal, if the agent uses all of the cash within 15 days in a second transaction that is reportable on Form 8300 or on Form 104, and discloses all the information necessary to complete Part II of Form 8300 or Form 104 to the recipient of the cash in the second transaction.
- In a transaction occurring entirely outside the United States. See Publication 1544, Reporting Cash Payments of Over $10,000 (Received in a Trade or Business), regarding transactions occurring in Puerto Rico and territories and possessions of the United States.
- In a transaction that is not in the course of a person's trade or business.

When to file. File Form 8300 by the 15th day after the date the cash was received. If that date falls on a Saturday, Sunday, or legal holiday, file the form on the next business day.

Where to file. File the form with the Internal Revenue Service, Detroit Computing Center, P.O. Box 32621, Detroit, MI 48232.

Statement to be provided. You must give a written or electronic statement to each person named on a required Form 8300 on or before January 31 of the year following the calendar year in which the cash is received. The statement must show the name, telephone number, and address of the information contact for the business, the aggregate amount of reportable cash received, and that the information was furnished to the IRS. Keep a copy of the statement for your records.

Multiple payments. If you receive more than one cash payment for a single transaction or for related transactions, you must report the multiple payments any time you receive a total amount that exceeds $10,000 within any 12-month period. Submit the report within 15 days of the date you receive the payment that causes the total amount to exceed $10,000. If more than one report is required within 15 days, you may file a combined report. File the combined report no later than the date the earliest report, if filed separately, would have to be filed.

Taxpayer identification number (TIN). You must furnish the correct TIN of the person or persons from whom you receive the cash and, if applicable, the person or persons on whose behalf the transaction is being conducted. You may be subject to penalties for an incorrect or missing TIN.

The TIN for an individual (including a sole proprietorship) is the individual's social security number (SSN). For certain resident aliens who are not eligible to get an SSN and nonresident aliens who are required to file tax returns, it is an IRS Individual Taxpayer Identification Number (ITIN). For other persons, including corporations, partnerships, and estates, it is the employer identification number (EIN).

If you have requested but are not able to get a TIN for one or more of the parties to a transaction within 15 days following the transaction, file the report and attach a statement explaining why the TIN is not included.

Exception: *You are not required to provide the TIN of a person who is a nonresident alien individual or a foreign organization if that person or foreign organization:*

- *Does not have income effectively connected with the conduct of a U.S. trade or business;*
- *Does not have an office or place of business, or a fiscal or paying agent in the United States;*
- *Does not furnish a withholding certificate described in §1.1441-1(e)(2) or (3) or §1.1441-5(c)(2)(iv) or (3)(iii) to the extent required under §1.1441-1(e)(4)(vii); or*
- *Does not have to furnish a TIN on any return, statement, or other document as required by the income tax regulations under section 897 or 1445.*

Penalties. You may be subject to penalties if you fail to file a correct and complete Form 8300 on time and you cannot show that the failure was due to reasonable cause. You may also be subject to penalties if you fail to furnish timely a correct and complete statement to each person named in a required report. A minimum penalty of $25,000 may be imposed if the failure is due to an intentional or willful disregard of the cash reporting requirements.

Penalties may also be imposed for causing, or attempting to cause, a trade or business to fail to file a required

Figure 25 — IRS Form 8300 — Report of Cash Payments Over $10,000 - Continued

report; for causing, or attempting to cause, a trade or business to file a required report containing a material omission or misstatement of fact; or for structuring, or attempting to structure, transactions to avoid the reporting requirements. These violations may also be subject to criminal prosecution which, upon conviction, may result in imprisonment of up to 5 years or fines of up to $250,000 for individuals and $500,000 for corporations or both.

Definitions

Cash. The term "cash" means the following:

- U.S. and foreign coin and currency received in any transaction.
- A cashier's check, money order, bank draft, or traveler's check having a face amount of $10,000 or less that is received in a designated reporting transaction (defined below), or that is received in any transaction in which the recipient knows that the instrument is being used in an attempt to avoid the reporting of the transaction under either section 6050I or 31 U.S.C. 5331.

Note. Cash does not include a check drawn on the payer's own account, such as a personal check, regardless of the amount.

Designated reporting transaction. A retail sale (or the receipt of funds by a broker or other intermediary in connection with a retail sale) of a consumer durable, a collectible, or a travel or entertainment activity.

Retail sale. Any sale (whether or not the sale is for resale or for any other purpose) made in the course of a trade or business if that trade or business principally consists of making sales to ultimate consumers.

Consumer durable. An item of tangible personal property of a type that, under ordinary usage, can reasonably be expected to remain useful for at least 1 year, and that has a sales price of more than $10,000.

Collectible. Any work of art, rug, antique, metal, gem, stamp, coin, etc.

Travel or entertainment activity. An item of travel or entertainment that pertains to a single trip or event if the combined sales price of the item and all other items relating to the same trip or event that are sold in the same transaction (or related transactions) exceeds $10,000.

Exceptions. A cashier's check, money order, bank draft, or traveler's check is not considered received in a designated reporting transaction if it constitutes the proceeds of a bank loan or if it is received as a payment on certain promissory notes, installment sales contracts, or down payment plans. See Publication 1544 for more information.

Person. An individual, corporation, partnership, trust, estate, association, or company.

Recipient. The person receiving the cash. Each branch or other unit of a person's trade or business is considered a separate recipient unless the branch receiving the cash (or a central office linking the branches), knows or has reason to know the identity of payers making cash payments to other branches.

Transaction. Includes the purchase of property or services, the payment of debt, the exchange of a negotiable instrument for cash, and the receipt of cash to be held in escrow or trust. A single transaction may not be broken into multiple transactions to avoid reporting.

Suspicious transaction. A suspicious transaction is a transaction in which it appears that a person is attempting to cause Form 8300 not to be filed, or to file a false or incomplete form.

Specific Instructions

You must complete all parts. However, you may skip Part II if the individual named in Part I is conducting the transaction on his or her behalf only. For voluntary reporting of suspicious transactions, see Item 1 below.

Item 1. If you are amending a prior report, check box 1a. Complete the appropriate items with the correct or amended information only. Complete all of Part IV. Staple a copy of the original report to the amended report.

To voluntarily report a suspicious transaction (see *Suspicious transaction* above), check box 1b. You may also telephone your local IRS Criminal Investigation Division or call 1-866-556-3974.

Part I

Item 2. If two or more individuals conducted the transaction you are reporting, check the box and complete Part I for any one of the individuals. Provide the same information for the other individual(s) on the back of the form. If more than three individuals are involved, provide the same information on additional sheets of paper and attach them to this form.

Item 6. Enter the taxpayer identification number (TIN) of the individual named. See *Taxpayer identification number (TIN)* on page 3 for more information.

Item 8. Enter eight numerals for the date of birth of the individual named. For example, if the individual's birth date is July 6, 1960, enter 07 06 1960.

Item 13. Fully describe the nature of the occupation, profession, or business (for example, "plumber," "attorney," or "automobile dealer"). Do not use general or nondescriptive terms such as "businessman" or "self-employed."

Item 14. You must verify the name and address of the named individual(s). Verification must be made by examination of a document normally accepted as a means of identification when cashing checks (for example, a driver's license, passport, alien registration card, or other official document). In item 14a, enter the type of document examined. In item 14b, identify the issuer of the document. In item 14c, enter the document's number. For example, if the individual has a Utah driver's license, enter "driver's license" in item 14a, "Utah" in item 14b, and the number appearing on the license in item 14c.

Note. You must complete all three items (a, b, and c) in this line to make sure that Form 8300 will be processed correctly.

Part II

Item 15. If the transaction is being conducted on behalf of more than one person (including husband and wife or parent and child), check the box and complete Part II for any one of the persons. Provide the same information for the other person(s) on the back of the form. If more than three persons are involved, provide the same information on additional sheets of paper and attach them to this form.

Items 16 through 19. If the person on whose behalf the transaction is being conducted is an individual, complete items 16, 17, and 18. Enter his or her TIN in item 19. If the individual is a sole proprietor and has an employer identification number (EIN), you must enter both the SSN and EIN in item 19. If the person is an organization, put its name as shown on required tax filings in item 16 and its EIN in item 19.

Item 20. If a sole proprietor or organization named in items 16 through 18 is doing business under a name other than that entered in item 16 (for example, a "trade" or "doing business as (DBA)" name), enter it here.

Item 27. If the person is not required to furnish a TIN, complete this item. See *Taxpayer Identification Number (TIN)* on page 3. Enter a description of the type of official document issued to that person in item 27a (for example, a "passport"), the country that issued the document in item 27b, and the document's number in item 27c.

Figure 25 — IRS Form 8300 — Report of Cash Payments Over $10,000 - Continued

Note. You must complete all three items (a, b, and c) in this line to make sure that Form 8300 will be processed correctly.

Part III

Item 28. Enter the date you received the cash. If you received the cash in more than one payment, enter the date you received the payment that caused the combined amount to exceed $10,000. See *Multiple payments* on page 3 for more information.

Item 30. Check this box if the amount shown in item 29 was received in more than one payment (for example, as installment payments or payments on related transactions).

Item 31. Enter the total price of the property, services, amount of cash exchanged, etc. (for example, the total cost of a vehicle purchased, cost of catering service, exchange of currency) if different from the amount shown in item 29.

Item 32. Enter the dollar amount of each form of cash received. Show foreign currency amounts in U.S. dollar equivalent at a fair market rate of exchange available to the public. The sum of the amounts must equal item 29. For cashier's check, money order, bank draft, or traveler's check, provide the name of the issuer and the serial number of each instrument. Names of all issuers and all serial numbers involved must be provided. If necessary, provide this information on additional sheets of paper and attach them to this form.

Item 33. Check the appropriate box(es) that describe the transaction. If the transaction is not specified in boxes a–i, check box j and briefly describe the transaction (for example, "car lease," "boat lease," "house lease," or "aircraft rental"). If the transaction relates to the receipt of bail by a court clerk, check box i, "Bail received by court clerks." This box is only for use by court clerks. If the transaction relates to cash received by a bail bondsman, check box **d**, "Business services provided."

Part IV

Item 36. If you are a sole proprietorship, you must enter your SSN. If your business also has an EIN, you must provide the EIN as well. All other business entities must enter an EIN.

Item 41. Fully describe the nature of your business, for example, "attorney" or "jewelry dealer." Do not use general or nondescriptive terms such as "business" or "store."

Item 42. This form must be signed by an individual who has been authorized to do so for the business that received the cash.

Comments

Use this section to comment on or clarify anything you may have entered on any line in Parts I, II, III, and IV. For example, if you checked box b (Suspicious transaction) in line 1 above Part I, you may want to explain why you think that the cash transaction you are reporting on Form 8300 may be suspicious.

Privacy Act and Paperwork Reduction Act Notice. Except as otherwise noted, the information solicited on this form is required by the Internal Revenue Service (IRS) and the Financial Crimes Enforcement Network (FinCEN) in order to carry out the laws and regulations of the United States Department of the Treasury. Trades or businesses, except for clerks of criminal courts, are required to provide the information to the IRS and FinCEN under both section 6050I and 31 U.S.C. 5331. Clerks of criminal courts are required to provide the information to the IRS under section 6050I. Section 6109 and 31 U.S.C. 5331 require that you provide your social security number in order to adequately identify you and process your return and other papers. The principal purpose for collecting the information on this form is to maintain reports or records which have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings, or in the conduct of intelligence or counterintelligence activities, by directing the federal Government's attention to unusual or questionable transactions.

You are not required to provide information as to whether the reported transaction is deemed suspicious. Failure to provide all other requested information, or providing fraudulent information, may result in criminal prosecution and other penalties under Title 26 and Title 31 of the United States Code.

Generally, tax returns and return information are confidential, as stated in section 6103. However, section 6103 allows or requires the IRS to disclose or give the information requested on this form to others as described in the Code. For example, we may disclose your tax information to the Department of Justice, to enforce the tax laws, both civil and criminal, and to cities, states, the District of Columbia, to carry out their tax laws. We may disclose this information to other persons as necessary to obtain information which we cannot get in any other way. We may disclose this information to federal, state, and local child support agencies; and to other federal agencies for the purposes of determining entitlement for benefits or the eligibility for and the repayment of loans. We may also provide the records to appropriate state, local, and foreign criminal law enforcement and regulatory personnel in the performance of their official duties. We may also disclose this information to other countries under a tax treaty, or to federal and state agencies to enforce federal nontax criminal laws and to combat terrorism. In addition, FinCEN may provide the information to those officials if they are conducting intelligence or counter-intelligence activities to protect against international terrorism.

You are not required to provide the information requested on a form that is subject to the Paperwork Reduction Act unless the form displays a valid OMB control number. Books or records relating to a form or its instructions must be retained as long as their contents may become material in the administration of any law under Title 26 or Title 31.

The time needed to complete this form will vary depending on individual circumstances. The estimated average time is 21 minutes. If you have comments concerning the accuracy of this time estimate or suggestions for making this form simpler, you can write to the Internal Revenue Service, Tax Products Coordinating Committee, SE:W:CAR:MP:T:T:SP, 1111 Constitution Ave. NW, IR-6526, Washington, DC 20224. Do not send Form 8300 to this address. Instead, see *Where to File* on page 3.

Section 7.6 Special Fee Splitting Provisions

The practice of fee splitting may be an ethical practice if it is done in compliance with RPC 1.5(e) (Appendix I). However, full compliance often involves substantive and reporting compliance with several additional rules. Among the situations covered are:

A. Out-of-State Attorneys

Rule 1:21-6(f) and (g) require the maintenance of all such records for seven years.

B. Certified Civil and Criminal Trial Attorneys

Rule 1:39-6(d) (Appendix H) authorizes a division of fees by a certified trial attorney with another attorney without being related to the services rendered by each. This rule requires the maintenance of the same records under *R.* 1:21-6(c)(1)(F) that apply to any payments to another attorney. The rule, however, expressly excludes "matrimonial law matters", since no division of fees based on referral is allowed in these cases.

C. I.R.S. Reporting Requirement

Revenue Rule 85-50 (April 22, 1985) holds that referral commissions exceeding $600 per year paid by one professional to another must be reported on Form 1099 MISC, if the recipient of the split or referral fee is not incorporated. The ruling has its basis in Section 6041(a) of the Internal Revenue Code, which provides that all persons who are engaged in a trade or business who pay $600 or more in gains, profit or income in any one taxable year must report the exact amount paid and must also identify the recipient of those payments. Section 1.6041-1(d)(2) of the regulations promulgated by the I.R.S. specifically cites attorneys, physicians and realtors as examples of professionals who must comply.

CHAPTER 8 — AVOIDING THEFT OF FUNDS

Section 8.0 The Need For Control

Having a good working set of accounting records is an essential step toward the sensible management of both client trust funds and attorney business funds. Without required records, the attorney can be ethically responsible for knowingly, or negligently, invading clients' trust funds. Equally important is the fact that the attorney who has poor records is ripe for theft by partners, associates, bookkeepers and secretarial employees.

Even when records are properly established, however, records alone do not satisfy the attorney's ethical obligations and do not serve as a defense against theft by others. In order to meet these challenges one must (a) maintain records in proper working order and (b) exercise control over these records by actively reviewing them in accordance with a regular oversight program. This chapter outlines some of the steps by which lawyers can control their attorney trust and business accounts and meet ethical obligations and, also, minimize the possibilities for theft.

Section 8.1 Diversification of Financial Functions

The cardinal rule in avoiding theft and fraud is to divide the monetary functions in a law office. This is particularly difficult for a small firm or sole practitioner. However, if one secretary, for example, is given authority and responsibility to handle the trust and business account, reconcile these accounts, handle bank statements and, occasionally, even sign checks, that one person can easily doctor the records to cover up a theft and avoid detection for a long period of time. The same is true where one attorney in a firm has sole responsibility for accounts with no oversight. Either one could unilaterally steal the law firm blind.

Ideally, the following careful division of functions is desirable:

- Only an attorney may be authorized to sign trust checks. This provision is mandatory under *R.*1:21-6(c)(1)(A).

- Only one secretary or bookkeeper should have access to trust and business account records. Multiple access by many secretaries makes it more difficult to pinpoint responsibility; it also increases opportunities for theft.

- A separate secretary should open all mail and record all incoming checks, which should then be given to the secretary/bookkeeper responsible for maintaining the accounts.

- All accounting records must be reconciled by the attorney on a monthly basis (or by an independent accountant, secretary or bookkeeper) and reviewed by the attorney.

- The attorney responsible should receive directly all monthly bank statements unopened.

- An annual (or quarterly) audit should be done by an accountant.

This layered diversification of responsibility minimizes the opportunities for fraud, since successful theft in this system requires collusion between two or more persons.

Section 8.2 Exercising Control of Records

Control is not a self-executing concept. For control to be effective, it must be exercised. The following are positive steps that can be taken to exercise control over trust and business account funds:

(a) When the attorney signs trust account checks, a review of the client's ledger sheet should be made to determine the validity of the checks drawn.

(b) A periodic review must be made of the book reconciliation prepared by the secretary/bookkeeper/accountant to determine its correctness.

(c) A perusal and inquiry of checks outstanding for an extended period of time should also be made periodically.

(d) Randomly, a review of the current balance in the checkbook and the balance of funds reflected on the client's ledger card should be undertaken when a disbursement is made to insure that there are sufficient collected funds to accommodate the disbursement.

(e) The bank statement (with cancelled checks) should be delivered unopened to the attorney. The attorney should then peruse the cancelled checks for the following:

(1) Are the payees familiar?

(2) Are the clients who are named on the checks firm clients?

(3) Are endorsements made by the payee or by an employee in the law office?

(4) Are checks being cashed instead of being deposited? If so, communicate with one or two payees to make sure they receive the money.

(5) Are duplicate payments being made? If so, is one legitimate and the other being taken by an employee?

(6) Is your signature on all cheeks authentic? DO NOT use signature stamps.

(f) Randomly review bank statements that are delivered to you **unopened** to make sure that none are missing. **Personally** obtain and review any missing bank statements and also any checks that have been outstanding for a long time or that are missing.

Section 8.3 Exercising Control of Employees

A. Hiring

Just as a dispossess action is no substitute for finding a good tenant, so too a lawsuit or criminal action is not much solace for hiring a dishonest employee. There is no substitute for hiring good, honest employees. While there are no guarantees on new employees, there are basic steps that should be taken. It is most important to do a through background review and to check references.

One law firm hired a bright, attractive secretary who had excellent skills. They later fired her for stealing $26,000 and only then inquired of her former employer to find out she had previously been fired at that firm and criminally prosecuted for theft.

B. Instruction

Lawyers are ethically obligated under RPC 5.3 to properly instruct and oversee employees to ensure that their actions are compatible with the lawyer's professional obligations. This is particularly true of those employees who will be involved with the handling of clients' and firm funds. Give them a copy of *R.*1:21-6 and this book and make sure they understand the basics. Then follow up periodically and check their compliance. Even if an account is hired, give that firm a copy of *R.*1:21-6 to be sure they know the particular rules that lawyers are required to observe.

C. Oversight

Sometimes employees seem too good to be true. Those signals should be considered carefully if you believe there could be theft or fraud by an employee:

- Does the employee come in early (usually before the boss) and stay later than necessary (usually after the boss has left)?
- Does the employee come in on Saturdays, Sundays and holidays when not required to do so?
- Does the employee fail to take earned vacations?

D. Process

It is essential that all law firms develop a sound, routine process for handling checks so that any deviations will serve to highlight questionable practices. Key among these processes are:

- Use restrictive endorsements on all checks received, marked "for deposit only" into a specific account or accounts.
- Require two signatures for large checks.
- **Never** use a facsimile signature stamp.
- **Never** write trust account checks to cash. *R.*1:21-6(c)(1)(A)
- **Never** use an ATM card to withdraw trust funds. *R.*1:21-6(c)(2)

Section 8.4 Billing Clients Regularly

One of the quickest ways to determine whether or not fees paid by clients for legal services (as well as other monies paid to the law firm on the client's behalf) have been improperly handled, is to bill clients promptly. If money is being diverted to other purposes by law firm staff and is not correctly reflected on the bill, the client will be the first to complain. For this reason many lawyers also account to clients more frequently than they are otherwise obligated to do.

Section 8.5 Separate Trust Accounts For Lawyers In Same Firm

There is no limit to the number of attorney trust accounts that may be maintained by a lawyer or law firm. There is also no requirement that prohibits each lawyer in a firm from maintaining trust accounts in the lawyer's own name separate from the firm. However, for good control, oversight and accountability, firm accounts are preferable to individual accounts. Where individual partners or shareholders have separate trust accounts, they unnecessarily expose their partners to liability, usually without the other partners having any ability to exercise oversight or control over the handling of clients' funds in the separate accounts. Thus, if one lawyer embezzled partnership clients' funds from a separate account, all partners would be jointly liable under partnership law. *N.J.S.A.* 42:1A-17.

Section 8.6 Insurance—The Ultimate Control

The ultimate risk control mechanism is insurance. Despite all prudent audit control steps one may take, it is still possible that a theft may occur. If reasonable audit control steps have been followed, however, such a theft will be detected at an early time and, hopefully, while the

amount of money taken is small. Nevertheless, in a time where typical mortgage amounts run from $200,000 to $500,000, just one theft can expose the lawyer to tremendous financial risk.

Insurance is the key to avoiding civil liability for theft by another lawyer in the firm. All malpractice insurance policies have a standard exclusion relating to criminal, fraudulent and dishonest conduct of an insured. However, many also contain an "Innocent Insured Exception" to this inclusion. One company writing many attorney malpractice policies in New Jersey today, has had a standard provision in its claims made policy that, in effect, covers each and every insured who did not personally commit, participate or acquiesce in the criminal, dishonest, fraudulent or malicious act, or remain passive after having personal knowledge of such act.

Under this policy an "innocent" attorney partner, shareholder or sole practitioner would not be faced with declaring personal bankruptcy if another attorney in the firm stole $800,000 as the result of a gambling, drug or alcohol problem. Every lawyer should therefore be sure that his or her firm's malpractice policy contains this "innocent" attorney exception. Attorneys should also inquire about the cost of "Dishonest Employee" coverage for non-lawyer staff who handle trust and business funds.

APPENDIX A. RECORDKEEPING RULE 1:21-6

1:21-6. Recordkeeping; Sharing of Fees; Examination of Records

(a) Required Trust and Business Accounts. Every attorney who practices in this state shall maintain in a financial institution in New Jersey, in the attorney's own name, or in the name of a partnership of attorneys, or in the name of the professional corporation of which the attorney is a member, or in the name of the attorney or partnership of attorneys by whom employed:

(1) a trust account or accounts, separate from any business and personal accounts and from any fiduciary accounts that the attorney may maintain as executor, guardian, trustee, or receiver, or in any other fiduciary capacity, into which trust account or accounts funds entrusted to the attorney's care shall be deposited; and

(2) a business account into which all funds received for professional services shall be deposited.

One or more of the trust accounts shall be the IOLTA account or accounts required by Rule 1:28A.

Other than fiduciary accounts maintained by an attorney as executor, guardian, trustee, or receiver, or in any other similar fiduciary capacity, all attorney trust accounts, whether general or specific, as well as all deposit slips and checks drawn thereon, shall be prominently designated as an "Attorney Trust Account." Nothing herein shall prohibit any additional descriptive designation for a specific trust account. All business accounts, as well as all deposit slips and all checks drawn thereon, shall be prominently designated as an "Attorney Business Account," an "Attorney Professional Account," or an "Attorney Office Account." The IOLTA account or accounts shall each be designated "IOLTA Attorney Trust Account."

The names of institutions in which such primary attorney trust and business accounts are maintained and identification numbers of each account shall be recorded on the annual registration form filed with the annual payment, pursuant to Rule 1:20-1(b) and Rule 1:28-2, to the Disciplinary Oversight Committee and the New Jersey Lawyers' Fund for Client Protection. Such information shall be available for use in accordance with paragraph (h) of this rule. For all IOLTA accounts, the account numbers, the name the account is under, and the depository institution shall be indicated on the registration statement. The signed annual registration statement required by Rule 1:20-1(c) shall constitute authorization to depository institutions to convert an existing non-interest bearing account to an IOLTA account.

(b) Account Location; Financial Institution's Reporting Requirements. An attorney trust account shall be maintained only in New Jersey financial institutions approved by the Supreme Court, which shall annually publish a list of such approved institutions. A financial institution shall be approved if it shall file with the Supreme Court an agreement, in a form provided by the Court, to report to the Office of Attorney Ethics in the event any properly payable attorney trust account instrument is presented against insufficient funds, irrespective of whether the instrument is honored; any such agreement shall apply to all branches of the financial institution and shall not be canceled except on thirty days' notice in writing to the Office of Attorney

Ethics. The agreement shall further provide that all reports made by the financial institution shall be in the following format: (1) in the case of a dishonored instrument, the report shall be identical to the overdraft notice customarily forwarded to the depositor; (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 attorney or law firm, the account number, the date of presentation for payment, and the date paid, as well as the amount of the overdraft created thereby. Such reports shall be made simultaneously with, and within the time provided by law for, notice of dishonor, if any; if an instrument presented against insufficient funds is honored, then the report shall be made within five banking days of the date of presentation for payment against insufficient funds.

In addition, each financial institution approved by the Supreme Court must co-operate with the IOLTA Program, and must offer an IOLTA account to any attorney who wishes to open one, and must from its income on such IOLTA accounts remit to the Fund the amount remaining after providing such institution a just and reasonable return equivalent to its return on similar non-IOLTA interest-bearing deposits. These remittances shall be monthly unless otherwise authorized by the Fund.

Nothing herein shall prevent an attorney from establishing a separate interest-bearing account for an individual client in accordance with these rules, providing that all interest earned shall be the sole property of the client and may not be retained by the attorney.

In addition to the reports specified above, approved financial institutions shall agree to cooperate fully with the Office of Attorney Ethics and to produce any attorney trust account or attorney business account records on receipt of a subpoena therefor. Digital images of these records may be kept and produced by financial institutions provided that: (a) imaged copies of checks shall, when printed, be limited to no more than two checks per page (front and back) and (b) all digital records shall be maintained for a period of seven years. Nothing herein shall preclude a financial institution from charging an attorney or law firm for the reasonable cost of producing the reports and records required by this Rule. Every attorney or law firm in this state shall be conclusively deemed to have consented to the reporting and production requirements mandated by this Rule.

(c) Required Bookkeeping Records.

(1) Attorneys, partnerships of attorneys and professional corporations who practice in this state shall maintain in a current status and retain for a period of seven years after the event that they record:

(A) appropriate receipts and disbursements journals containing a record of all deposits in and withdrawals from the accounts specified in paragraph (a) of this rule and of any other bank account which concerns or affects their practice of law, specifically identifying the date, source and description of each item deposited as well as the date, payee and purpose of each disbursement. All trust account receipts shall be deposited intact and the duplicate deposit slip shall be sufficiently detailed to identify each item. All trust account withdrawals shall be made only by attorney authorized financial institution transfers as stated below or by check payable to a named payee and not to cash. Each electronic transfer out of an attorney trust account must

be made on signed written instructions from the attorney to the financial institution. The financial institution must confirm each authorized transfer by returning a document to the attorney showing the date of the transfer, the payee, and the amount. Only an attorney admitted to practice law in this state shall be an authorized signatory on an attorney trust account, and only an attorney shall be permitted to authorize electronic transfers as above provided; and

(B) an appropriate ledger book, having at least one single page for each separate trust client, for all trust accounts, showing the source of all funds deposited in such accounts, the names of all persons for whom the funds are or were held, the amount of such funds, the description and amounts of charges or withdrawals from such accounts, and the names of all persons to whom such funds were disbursed. A regular trial balance of the individual client trust ledgers shall be maintained. The total of the trial balance must agree with the control figure computed by taking the beginning balance, adding the total of moneys received in trust for the client, and deducting the total of all moneys disbursed; and

(C) copies of all retainer and compensation agreements with clients; and

(D) copies of all statements to clients showing the disbursement of funds to them or on their behalf; and

(E) copies of all bills rendered to clients; and

(F) copies of all records showing payments to attorneys, investigators or other persons, not in their regular employ, for services rendered or performed; and

(G) originals of all checkbooks with running balances and check stubs, bank statements, prenumbered cancelled checks and duplicate deposit slips, except that, where the financial institution provides proper digital images or copies thereof to the attorney, then these digital images or copies shall be maintained; all checks, withdrawals and deposit slips, when related to a particular client, shall include, and attorneys shall complete, a distinct area identifying the client's last name or file number of the matter; and

(H) copies of all records, showing that at least monthly a reconciliation has been made of the cash balance derived from the cash receipts and cash disbursement journal totals, the checkbook balance, the bank statement balance and the client trust ledger sheet balances; and

(I) copies of those portions of each client's case file reasonably necessary for a complete understanding of the financial transactions pertaining thereto.

(2) ATM or cash withdrawals from all attorney trust accounts are prohibited.

(3) No attorney trust account shall have any agreement for overdraft protection.

(d) Type and Availability of Bookkeeping Records. The financial books and other records required by paragraphs (a) and (c) of this rule shall be maintained in accordance with generally accepted accounting practice. Bookkeeping records may be maintained by computer provided they otherwise comply with this rule and provided further that printed copies and computer files in industry-standard formats can be made on demand in accordance with this section or section (h). They shall be located at the principal New Jersey office of each attorney, partnership or professional corporation and shall be available for inspection, checks for compliance with this Rule and copying at that location by a duly authorized representative of the Office of Attorney Ethics. When made available pursuant to this rule, all such books and records shall remain confidential except for the purposes thereof or by direction of the Supreme Court, and their contents shall not be disclosed by anyone in such a way as to violate the attorney-client privilege.

(e) Dissolutions. Upon the dissolution of any partnership of attorneys or of any professional corporation, the former partners or shareholders shall make appropriate arrangements for the maintenance by one of them or by a successor firm of the records specified in paragraph (c) of this rule.

(f) Attorneys Practicing With Foreign Attorneys or Firms. All of the requirements of this rule shall be applicable to every attorney rendering legal services in this state regardless whether affiliated with or otherwise related in any way to an attorney, partnership, legal corporation, limited liability company, or limited liability partnership formed or registered in another state.

(g) Attorneys Associated With Out of State Attorneys. An attorney who practices in this state shall maintain and preserve for seven years a record of all fees received and expenses incurred in connection with any matter in which the attorney was associated with an attorney of another state.

(h) Availability of Records. Any of the records required to be kept by this rule shall be produced in response to a subpoena duces tecum issued in connection with an ethics investigation or hearing pursuant to R. 1:20-1 to 1:20-11, or shall be produced at the direction of the Disciplinary Review Board or the Supreme Court. They shall be available upon request for review and audit by the Office of Attorney Ethics. Every attorney shall be required to cooperate and to respond completely to questions by the Office of Attorney Ethics regarding all transactions concerning records required to be kept under this rule. When so produced, all such records shall remain confidential except for the purposes of the particular proceeding and their contents shall not be disclosed by anyone in such a way as to violate the attorney-client privilege. When produced or examined during the course of a disciplinary or random audit, both the attorney or law firm and the producers and licensors of computerized software shall be conclusively deemed to have consented to the use of said software by disciplinary authorities as evidence during the course of the disciplinary proceeding.

(i) Disciplinary Action. An attorney who fails to comply with the requirements of this rule in respect of the maintenance, availability and preservation of accounts and records or who

fails to produce or to respond completely to questions regarding such records as required shall be deemed to be in violation of R.P.C. 1.15(d) and R.P.C. 8.1(b).

(j) Unidentifiable and Unclaimed Trust Fund Accumulations and Trust Funds Held for Missing Owners. When, for a period in excess of two years, an attorney's trust account contains trust funds which are either unidentifiable, unclaimed, or which are held for missing owners, such funds shall be so designated. A reasonable search shall then be made by the attorney to determine the beneficial owner of any unidentifiable or unclaimed accumulation, or the whereabouts of any missing owner. If the beneficial owner of an unidentified or unclaimed accumulation is determined, or if the missing beneficial owner is located, the funds shall be delivered to the beneficial owner when due. Trust funds which remain unidentifiable or unclaimed, and funds which are held for missing owners, after being designated as such, may, after the passage of one year during which time a diligent search and inquiry fails to identify the beneficial owner or the whereabouts of a missing owner, be paid to the Clerk of the Superior Court for deposit with the Superior Court Trust Fund. The Clerk shall hold the same in trust for the beneficial owners or for ultimate disposition as provided by order of the Supreme Court. All applications for payment to the Superior Court Clerk under this section shall be supported by a detailed affidavit setting forth specifically the facts and all reasonable efforts of search, inquiry and notice. The Clerk of the Superior Court may decline to accept funds where the petition does not evidence diligent search and inquiry or otherwise fails to conform with this section.

Note: Source-R.R. 1:12-5A(a)(b)(c). Caption amended and paragraph (d) adopted July 1, 1970 effective immediately; paragraph (c) amended July 7, 1971 to be effective September 13, 1971; paragraph (a) amended April 2, 1973 to be effective immediately; paragraph (c) amended July 17, 1975 to be effective September 8, 1975; caption and paragraph (a) amended July 29, 1977 to be effective September 6, 1977. Paragraphs (a) and (b) amended, new paragraph (c) adopted and former paragraphs (c), (d), (e), (f) and (g) redesignated and amended February 23, 1978 to be effective April 1, 1978; paragraphs (b), (c) and (h) amended November 22, 1978 to be effective January 1, 1979; paragraph (a) amended July 16, 1979 to be effective September 10, 1979; paragraph (b) amended July 16, 1981 to be effective September 14, 1981; paragraphs (a), (b), (c), (g) and (h) amended January 31, 1984 to be effective February 15, 1984 except that the amendments to paragraph (a)(2) regarding designations to be placed on trust and business accounts shall not be effective until July 1, 1984; effective date of amendment to paragraph (a)(2) deferred on June 15, 1984 from July 1, 1984 to September 1, 1984; paragraphs (a)(1) and (2), (e)(1) and (h) amended July 26, 1984 to be effective September 10, 1984; paragraphs (a), (e) and (f) amended November 1, 1984 to be effective March 1, 1985; paragraphs (b) and (c) amended and paragraph (i) adopted November 5, 1986 to be effective January 1, 1987; paragraph (a) amended July 14, 1992 to be effective September 1, 1992; paragraph (a)(2) amended September 15, 1992, to be effective January 1, 1993; former paragraph (e) deleted and new paragraph (e) adopted November 18, 1996, to be effective January 1, 1997; paragraph (a) amended, new paragraph (b) added, former paragraphs (b) through (i) redesignated as paragraphs (c) through (j), and redesignated paragraphs (c), (d), (e), (h), and (i) amended July 12, 2002 to be effective September 3, 2002; caption of Rule and paragraphs (a) and (b) amended February 6, 2003 to be effective March 1, 2003; paragraph (c) , (e), (f), (g), and (j) amended July 28, 2004 to be effective September 1, 2004.

APPENDIX B. RULE OF PROFESSIONAL CONDUCT—1.15—SAFEKEEPING PROPERTY

RPC 1.15 SAFEKEEPING PROPERTY

(a) 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 a separate account maintained in a financial institution in New Jersey. Funds of the lawyer that are reasonably sufficient to pay bank charges may, however, be deposited therein. 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 seven years after the event that they record.

(b) 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.

(c) When in the course of representation a lawyer is in possession of property in which both the lawyer and another person claim interests, the property shall be kept separate by the lawyer until there is an accounting and severance of their interests. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved.

(d) A lawyer shall comply with the provisions of R. 1:21-6 ("Recordkeeping") of the Court Rules.

Original Unofficial 1995 Comment to RPC 1.15

The Court, with two revisions, has adopted the recommendation of the Debevoise Committee, which in turn differs somewhat from the ABA-approved version of this rule. The Court deleted from the Debevoise Committee recommendation the provision that would have permitted clients' funds to be maintained in another state with the consent of the client, instead requiring the funds to be maintained in New Jersey accounts.

There is no doubt that a lawyer, as pointed out by the ABA and the Kutak Commission, should hold the property of others "with the care required of a professional fiduciary." This rule details that requirement by defining the obligations of the attorney as to the holding of property of clients or third persons. It requires, inter alia, that attorneys utilize trust accounts for the funds of clients, echoing the mandate of R. 1:21-6(a), as well as holding separate other client property. See In re Lehet, 95 N.J. 466, 468 (1984); In re Jacob, 95 N.J. 132 (1984). The Court has added paragraph (d), emphasizing compliance with the recordkeeping provisions of R. 1:21-6.

The rule also imposes a duty upon the attorney to notify the client upon receipt of funds or property in which the client has an interest and in most cases to deliver that property to the client promptly. It further contains provisions for handling disputed interests in property.

APPENDIX C. RULE 1:28A. INCOME ON NON-INTEREST BEARING LAWYERS TRUST ACCOUNTS (IOLTA) FUND

1:28A-1. Purpose; Administration; Appointments

(a) Administration. The Supreme Court shall appoint six Trustees to administer and operate, in accordance with these Rules, the IOLTA Fund of the Bar of New Jersey, whose purpose is to provide a means of using the return to IOLTA on income earned by depository institutions from funds held in IOLTA accounts to fund law-related, public-interest programs. In addition to the Trustees appointed by the Supreme Court, the following shall be ex officio members and will have the right to vote on all matters except grant applications made to the Board of Trustees, but they may participate in Board discussions of the grant applications: the President of the New Jersey State Bar Association; the First Vice President of the New Jersey State Bar Foundation; and the President of Legal Services of New Jersey, Inc.

(b) Qualification, Terms of Trustees. The original appointment shall be of two Trustees for a one-year term, one for a two-year term, one for a three-year term, one for a four-year term and one for a five-year term. At the expiration of such terms all subsequent appointments shall be for a term of five years, and no Trustee who has served a full five-year term shall be eligible for immediate reappointment. A vacancy occurring during a term shall be filled for the unexpired portion thereof. At least four of the Trustees appointed by the Supreme Court shall be members of the bar of this State.

(c) Organization; Meetings. The Trustees shall organize annually and shall then elect from among their number a chairperson and a treasurer to serve for a one-year term and such other officers for such terms as they deem necessary or appropriate. Meetings thereafter shall be held at the call of the chairperson. Except as may be otherwise provided by this rule or by regulations promulgated by the Trustees, five of the nine trustees, including the ex officio members, shall constitute a quorum and may transact all business not involving grants. Four of the six Trustees appointed by the Supreme Court shall constitute a quorum for all decisions concerning grants.

(d) Regulations. The Trustees shall adopt regulations, consistent with these rules and subject to the approval of the Supreme Court, governing the administration of the Fund, the procedures for the presentation, consideration, and payment of grants, and the exercise of their investment powers.

(e) Reimbursement. The Trustees shall serve without compensation.

Note: Adopted February 23, 1988, to be effective March 1, 1988; paragraphs (a), (b), (c) and (d) amended September 15, 1992, to be effective January 1, 1993; paragraph (a) amended July 10, 1998, to be effective September 1, 1998; caption of Rule 1:28A and paragraphs (a) and (b) of Rule 1:28A-1 amended February 6, 2003 to be effective March 1, 2003.

1:28A-2. Attorney IOLTA Trust Accounts

(a) Attorney Participation. Commencing on the date established by regulations to be adopted by the Board of Trustees pursuant to Rule 1:28A-1(d), every attorney who practices in this State shall maintain in a financial institution in New Jersey, in the attorney's own name or in the name of a partnership of attorneys, or in the name of the professional corporation or limited liability entity of which the attorney is a member, or in the name of the attorney or partnership of attorneys by whom employed, an IOLTA non-interest-bearing trust account or accounts for all clients' funds that are not placed at interest for the benefit of the client.

(1) The IOLTA non-interest-bearing trust account may be established with any financial institution approved by the Supreme Court to hold attorney trust funds under R. 1:21-6(a) and insured by the Federal Deposit Insurance Corporation or an analogous federal government agency. Funds in each IOLTA non-interest-bearing trust account will be subject to withdrawal on request and without delay.

(2) Funds shall be deposited in an IOLTA non-interest-bearing trust account authorized by this Rule when an attorney determines that a trust account deposit will not be placed at interest for a client. Such a determination shall be made whenever an attorney determines that either (A) the amount of the funds or the period of time that the funds are held, if deposited in an interest-bearing account, would not earn interest in excess of the cost incurred to secure such interest, or (B) because of particular costs in accounting, administration, or attribution of income, as may occur when multiple parties or clients pool advance payments against the costs of litigation in a single fund, a client's funds should not be deposited in an interest-bearing account because they will not realize income. No ethical impropriety will attend an attorney's depositing such funds in an IOLTA non-interest-bearing trust account in accordance with this Rule.

(3) An attorney or law firm shall maintain one or more IOLTA non-interest-bearing trust accounts and shall submit to the approved financial institutions in which such accounts are maintained such forms as may be necessary to establish and maintain such accounts, on forms prescribed by the Trustees, and provide a copy of such form to the IOLTA Fund Trustees. If such a form is not filed, the signed registration statement required by Rule 1:20-1 and Rule 1:21-6 shall constitute such authorization.

(b) Deposit of Funds in IOLTA Account. An attorney will exercise good-faith judgment in determining initially whether the funds of a client are of a nominal amount, are expected to be held by the attorney for a short period of time, or otherwise fall within the circumstances described in (a) above.

In exercising that judgment, the attorney will also consider such other factors as:

(1) the cost of establishing and maintaining a separate non-IOLTA, interest-bearing trust account, including service charges, bookkeeping and accounting and tax-reporting procedures;

(2) the nature of the transaction(s) involved;

(3) the likelihood of delay in the matter for which the funds are held;

(4) whether the funds received by an attorney in a fiduciary capacity from a client or beneficial owner will generate less than $150 of interest, provided that that $150 figure may be used by an attorney as a minimum threshold indicating whether monies received in a fiduciary capacity should be placed in an IOLTA trust account, but shall not preclude the use of a higher figure if the costs or circumstances warrant; and

(5) the other circumstances described in (a) above.

(c) Periodic Review of Deposits. At reasonable intervals, an attorney should consider whether changed circumstances require different action respecting the deposit of client funds.

(d) Registration; Enforcement. The accounts required by this Rule shall be registered annually with the IOLTA Fund in the manner prescribed by the IOLTA Fund Trustees. The Trustees shall annually report the names of all attorneys failing to comply with the provisions of this Rule to the Supreme Court for inclusion on a list of those attorneys deemed ineligible to practice law in New Jersey by Order of the Court. An attorney shall be removed from the Ineligible List without further Order of the Court on submission to the Trustees of the prescribed forms.

(e) Duties of Financial Institution. The financial institution must:

(1) from its income on such IOLTA accounts remit to the Fund the amount remaining after providing such institutions a just and reasonable return equivalent to their return on similar non-IOLTA interest-bearing deposits. These remittances shall be monthly unless otherwise authorized by the Fund. And

(2) report in the form provided by the Fund.

Note: Adopted February 23, 1988, to be effective March 1, 1988; former rule deleted and R. 1:28A-3 renumbered as 1:28A-2 September 15, 1992, to be effective January 1, 1993; paragraph (a)(1) of former R. 1:28A-3 amended November 7, 1988, to be effective January 2, 1989; rule amended September 15, 1992, to be effective January 1, 1993; new paragraph (d) adopted and former paragraph (d) redesignated as paragraph (e) December 13, 1993, to be effective January 3, 1994; paragraph (a) amended July 10, 1998 to be effective September 1, 1998; paragraphs (a) and (e) amended February 6, 2003 to be effective March 1, 2003.

1:28A-3. Duties of Trustees and Officers

(a) Audit and Report. The Trustees shall arrange for an independent audit annually and at such other times as the Supreme Court shall direct, such audits to be at the expense of the Fund. The annual audit shall be included in a report to be submitted annually by the Trustees to the Supreme Court, reviewing in detail the administration of the Fund during the preceding year.

(b) Applications to the Supreme Court. The Trustees may apply to the Supreme Court for interpretations of these Rules and of the extent of their powers thereunder and for advice regarding the proper administration of the Fund.

(c) Treasurer's Duties. The treasurer shall maintain the assets of the Fund in separate accounts and shall disburse monies therefrom only on the action of the Trustees pursuant to these Rules. He or she shall file a bond annually with the Trustees with such surety as may be approved by them and in such amount as they may fix.

Note: Adopted as R. 1:28A-4 February 23, 1988, to be effective March 1, 1988; renumbered as R. 1:28A-3 and paragraphs (b) and (c) amended September 15, 1992, to be effective January 1, 1993.

1:28A-4. General Powers of Trustees

(a) Reserve Fund. The Trustees of the Fund are authorized to maintain a reasonable reserve fund. At least annually, after a reasonable reserve fund has been created, the Trustees will solicit applications for grants and award grants to those entities deemed to be meritorious under the regulations of the Fund. Grant-making decisions of the Board are final and are not subject to appeal or judicial review.

(b) Grants. Grants will be made only for the following purposes:

(1) legal aid to the poor;

(2) improvement of the administration of justice;

(3) education of lay persons in legal and justice-related areas; or

(4) such other programs for the benefit of the public as are specifically approved by the New Jersey Supreme Court from time to time.

(c) Awards. The Board of Trustees shall award:

(1) to Legal Services of New Jersey, Inc., not less than 75% of the funds available annually for grants, to be used directly by itself and, through subgrants, by its local

member Legal Services programs, in conducting legal assistance activities on behalf of the poor throughout New Jersey;

(2) to the New Jersey State Bar Foundation, not less than 12.5% of the funds available annually for grants to be used for the purposes enumerated in R. 1:28A-4(b)(1)-(4) above; and

(3) to other entities deemed to be meritorious under the regulations of the Fund, the balance of the funds available annually for grants to be used for the purposes enumerated in R. 1:28A-4(b)(1)-(4) above.

The foregoing may be amended by the Supreme Court from time to time in the public interest.

(d) General Powers. In addition to the powers conferred by these Rules on the Trustees, they shall have the following general powers:

(1) to receive, hold, manage, distribute, and invest the funds received by the Fund and such other funds as it may receive by voluntary contribution or otherwise;

(2) to employ and compensate consultants, agents, legal counsel, and such other employees as they deem necessary and appropriate consistent with personnel policies of the Judiciary; and

(3) to monitor and insure compliance with the provisions of this Rule.

Note: Adopted as R. 1:28A-5 February 23, 1988, to be effective March 1, 1988; renumbered as R. 1:28A-4 and amended September 15, 1992, to be effective January 1, 1993.

1:28A-5. Confidentiality

All activities conducted and records made or maintained by the IOLTA Fund in connection with its operations under this rule shall not be disclosed, except that the IOLTA Board is authorized to:

(a) Release such information as it may deem necessary to carry out its responsibilities as prescribed by this rule, including the identity of recipients and amounts and purposes of grant awards, and data concerning participating financial institutions; and

(b) Release statistical and other information in its annual report to the Supreme Court or as requested by the Supreme Court.

Note: Former Rule 1:28A-5 redesignated as Rule 1:28A-4 September 15, 1992 to be effective January 1, 1993. New Rule 1:28A-5 adopted July 12, 2002 to be effective September 3, 2002.

APPENDIX D. IOLTA PARTICIPATION FORM

DO NOT USE THIS FORM FOR EXISTING IOLTA ACCOUNTS

This form should be completed and returned only for a **NEW** account with a balance over $5,000 or for accounts formerly designated low-balance which now have an average balance over $5,000.

This is a sample form. Please do not reproduce. Instead, call IOLTA at 732-247-8222 to request originals.

IOLTA
INTEREST ON LAWYERS' TRUST ACCOUNTS

PARTICIPATION FORM
(INSTRUCTIONS ON REVERSE SIDE)

DO NOT SEND TO BANK

Return to:

IOLTA
NEW JERSEY LAW CENTER
ONE CONSTITUTION SQUARE
NEW BRUNSWICK, NEW JERSEY 08901-1520

TO:

_____
FINANCIAL INSTITUTION

_____
ADDRESS

_____

_____

FROM:

_____
ATTORNEY FIRM

_____
ADDRESS

_____

_____
FIRM CONTACT **PHONE**

Instructions to Financial Institution:

The account named below is my/the firm's general trust account. I/we shall participate in the Interest on Lawyer's Trust Accounts (**IOLTA**) Program established pursuant to New Jersey Court Rule 1:28-A. Please change the account identified below to an interest-bearing transaction account. Interest shall be paid by you directly to **IOLTA**. The effective date for use of this account shall be as soon as possible but no later than the first of the month following receipt of the form.

FOR IRS REPORTING:

1. **Name the account:** IOLTA/_____
   (Attorney/firm name: include "Attorney Trust Account")
2. **Trust Account Number** _____
3. **Enter IOLTA's T.I.N. #22-2878549**
4. **IOLTA's name shall not appear on checks or deposit slips.**

_____ _____ _____
Account signatory - (please print) **Signature** **Date**

ATTORNEYS: PLEASE ATTACH A LIST OF FIRM ATTORNEYS INCLUDED IN THIS NOTICE.

IOLTA 732-247-8222
www.ioltanj.org

Your participation helps provide equal access to justice – thank you.

IF3 11/07

IF YOU ARE FILING ON BEHALF OF A FIRM, BE SURE TO INCLUDE A LIST OF FIRM ATTORNEYS ADMITTED TO THE BAR OF NEW JERSEY.

INSTRUCTIONS FOR COMPLETING THE PARTICIPATION FORM:

1. If any account listed is used by more than one attorney, please attach a list (or firm letterhead, if appropriate) of each attorney who uses such account. In instances of shared law firm accounts where all IOLTA-eligible trust funds of attorneys in the firm are deposited in the account designated on the Participation Form, **ONLY ONE FORM NEED BE RETURNED PER FIRM** (and per account, if necessary), with the signature of the managing partner or other authorized attorney representative.

2. If you have more than one IOLTA-eligible account, please make copies of the Participation Form and complete a form for each account.

3. Rule 1:28-A directs The IOLTA Fund of the Bar of New Jersey to implement and administer the IOLTA program. Where appropriate, the IOLTA staff will transmit a copy of your form authorizing the IOLTA conversion to your financial institution.

4. Please be sure to SIGN the form.

5. You may wish to make and retain a copy of this form for your records. You must certify compliance with Rule 1:28-A on the Annual Attorney Registration Statement.

6. If you have other questions about IOLTA, please call the number listed below or visit us online at www.ioltanj.org.

The IOLTA Fund of the Bar of New Jersey
New Jersey Law Center
One Constitution Square
New Brunswick, NJ 08901-1520
(732) 247-8222
www.ioltanj.org

APPENDIX E. 2008 IOLTA REGISTRATION FORM AND INSTRUCTIONS

This is a sample form. Please do not reproduce. Instead, call IOLTA at 732-247-8222 to request originals.

CHECK ALL APPLICABLE ITEMS. FILL IN ACCOUNT NUMBER AND FINANCIAL INSTITUTION. COMPLETE FIRM INFORMATION AND SIGN THE FORM.

☐ 1. I certify that I currently maintain the interest bearing IOLTA account(s) listed below in BOX 1. (If you have additional accounts to be designated as IOLTA see item 3.)

☐ 2. I certify that the combined average balance in the trust accounts listed in BOX 2 is $5,000 or less and understand that these accounts will NOT be converted to interest bearing IOLTA accounts. I further certify that I will notify the IOLTA Fund of the Bar of New Jersey at such time as the average combined balances of said accounts exceed $5,000 and/or I establish other non-interest bearing attorney trust accounts or subaccounts that are subject to Rule 1:28A.

☐ 3. I presently have an attorney trust account(s) which should now be converted to an IOLTA account and **I HAVE COMPLETED AND ENCLOSED A PARTICIPATION FORM.** [NOTE: This includes NEW accounts with balances over $5,000 or those formerly designated as Low-Balance accounts which now have an average balance of more than $5,000.]

☐ 4. I certify that I do not have an attorney trust account containing nominal or short-term funds which is subject to the IOLTA requirement because I am not required to comply with R.1:21-6(a) and have so indicated on the Annual Attorney Registration Statement. I further certify that I will notify the IOLTA Fund of the Bar of New Jersey at such time as I establish a trust account which is subject to the IOLTA Rule.

FILL IN THE INFORMATION BELOW IF YOU CHECKED ITEMS 1 OR 2. IF YOU CHECKED ITEM 3 YOU MUST COMPLETE THE ENCLOSED PARTICIPATION FORM AND RETURN IT ALONG WITH THIS NOTICE.

BOX 1: IOLTA TRUST ACCOUNTS	BOX 2: LOW-BALANCE ACCOUNTS (together less than $5,000)
Account Number:_____ Financial Institution: _____	Account Number: _____ Financial Institution: _____
Account Number:_____ Financial Institution: _____	Account Number: _____ Financial Institution: _____

If you have additional accounts, please attach a separate sheet. Indicate if the additional accounts are IOLTA accounts or Low-Balance Accounts.

FIRMS: BE SURE TO INCLUDE A COMPLETE LIST OF FIRM ATTORNEYS ADMITTED TO THE BAR OF NEW JERSEY.

Name of Attorney (Please print) _____

Firm Name & Mailing Address _____

_____ Telephone No. _____

Signature _____ Date _____

For further assistance call (732) 247-8222.

Complete and return this form by February 1, 2008 to:

IOLTA Fund of the Bar of New Jersey
New Jersey Law Center
One Constitution Square
New Brunswick, NJ 08901-1520
www.ioltanj.org

IF2 11/07

NOTICE TO THE BAR

2008 IOLTA REGISTRATION

This is an official notice. To be in compliance for 2008 with New Jersey Supreme Court Rule 1:28A as amended your response is required not later than February 1, 2008.

Pursuant to R1:28A, participation in the IOLTA program is mandatory for any attorney engaged in the private practice of law. The Regulations of the IOLTA Fund of the Bar of New Jersey approved by the New Jersey Supreme Court require that IOLTA accounts shall be registered **annually** with the IOLTA Fund.

By executing the enclosed form (and the Participation Form if applicable), the undersigned attorney declares compliance for 2008 with the IOLTA Rule and Regulations. **The form must be filed by all attorneys admitted in New Jersey or on behalf of attorneys admitted in New Jersey who are part of a law firm.**

Information about approved trust account depositories is available online at www.ioltanj.org.

Board of Trustees, IOLTA Fund of the Bar of New Jersey

2008 IOLTA REGISTRATION INSTRUCTIONS

THE ENCLOSED REGISTRATION FORM MUST BE COMPLETED AND RETURNED TO IOLTA IN ORDER TO COMPLETE THE 2008 IOLTA REGISTRATION.

INSTRUCTIONS FOR COMPLETING THE REGISTRATION FORM:

1. The 2008 IOLTA Registration Form must be returned to the IOLTA Fund of the Bar of New Jersey by February 1, 2008. This form may be executed on behalf of a multi-attorney law firm with the signature of the managing partner or other authorized attorney representative verifying firm-wide compliance with the IOLTA Rule. Please attach a list (or firm letterhead, if appropriate) of each attorney in the firm admitted in New Jersey.

2. Please be sure to check the appropriate items, fill in the name, firm name and address, trust account number(s), financial institution, and SIGN the form.

3. PLEASE READ THE FOLLOWING CAREFULLY. IT IS POSSIBLE THAT ITEMS 1, 2, AND 3 ARE ALL APPLICABLE TO YOU. **ALL ATTORNEY TRUST ACCOUNTS SUBJECT TO R.1:28A MUST BE REGISTERED ANNUALLY WITH THE IOLTA FUND.**

   Check ITEM 1 if you have IOLTA trust account(s) and enter the trust account number and name of financial institution for each IOLTA account in BOX 1: IOLTA Trust Accounts. **BE SURE TO INCLUDE A LIST OF ALL FIRM ATTORNEYS ADMITTED IN NEW JERSEY.**

   Check ITEM 2 if you maintain general attorney trust account(s) with a combined average balance of less than $5,000. Fill in the trust account number and name of financial institution for each account in BOX 2: Low-Balance Accounts. You will be considered an inactive participant until such time as you notify the Fund that the combined average balance of such accounts exceeds $5,000. An inactive participant remains in compliance with Rule 1:28A, however the designated attorney trust accounts are NOT converted to interest bearing IOLTA accounts. **BE SURE TO INCLUDE A LIST OF ALL FIRM ATTORNEYS ADMITTED IN NEW JERSEY.**

   > NOTE: Accounts in which ALL monies are at interest for clients are considered low balance accounts for IOLTA purposes. Sub-accounts that are not interest-bearing for clients must be interest-bearing for IOLTA. Only the master account needs to be registered.

   Check ITEM 3 if you have a non-interest bearing trust account(s) which should be converted to an interest bearing IOLTA trust account. NOTE: This includes accounts formerly designated as Low-Balance which now have an average balance of more than $5,000. ALSO COMPLETE AND RETURN THE ENCLOSED PARTICIPATION FORM.

   Check ITEM 4 if you are not required to comply with R.1:21-6. (e.g. government attorney, retired)

4. You may wish to make and retain a copy of the completed form for your records. You must certify compliance with Rule 1:28A on the Annual Attorney Registration Statement.

5. If you need further assistance, please call us at the number below.

THE **PARTICIPATION FORM** SHOULD BE COMPLETED AND RETURNED ONLY IF THE DESIGNATED ACCOUNT IS TO BE CONVERTED TO AN INTEREST-BEARING IOLTA ACCOUNT.

COMPLETE THE REGISTRATION FORM AND RETURN BY FEBRUARY 1, 2008 TO:

IOLTA Fund of the Bar of New Jersey
New Jersey Law Center
One Constitution Square
New Brunswick, NJ 08901-1520
(732) 247-8222
www.ioltanj.org

IF1 11/07

APPENDIX F. ADVISORY OPINIONS

Opinion No. 124: Accounts—Commingling (91 N.J.L.J. 108 (February 15, 1968))

On September 26, 1967 our Supreme Court adopted R.R. 1:12-5 relating to accounts and records required to be kept by attorneys. Several inquiries have been made relative to the same.

The first inquiry is: Where an attorney's income is derived almost exclusively from his employment as "house counsel" or as an appointive officer of a corporation, must he maintain two separate accounts, a personal account and a business account?

If two accounts were required, the attorney would merely be required to transfer his salary earnings from his business to his personal account. Good sense and reasonableness dictate that under the above set of facts the attorney should not be required to keep books or records merely to record his periodic salary receipts. He is not handling monies on behalf of his employer. His employer is not a "client" in the usual sense of the word. To compel two accounts, two sets of records, would be a needless duplication and an unnecessary burden, serving no purpose in helping the court to correct a situation which sometimes occurs in the traditional attorney-client relationship. If, however, independent clients are represented from time to time, separate records for these cases should be kept as prescribed by the rule in question.

The second inquiry raises the question whether separate accounts must be kept where income is received by an attorney for professional services rendered to clients, and for monies earned for services rendered in a nonlegal capacity such as income received from teaching, income received as an insurance broker, as a real estate agent, or for rendering accounting services. The question is confined to these personal funds.

The rule in addition to requiring a separate trust account requires the maintenance of a "business account into which all funds received for professional services shall be deposited." Rules of the court should receive a reasonable construction and should be read sensibly rather than literally. *Ferguson & Beardsell v. Kays,* 21 N.J.L. 431 (Sup. Ct. 1848), *Douglas v. Harris,* 36 N.J. 270 (1961). One of the prime objectives of the new rule is to assist an ethics committee to determine if a proper accounting has been made to a client. Accordingly, only monies received in connection with the practice of law should be deposited in the business account required by the rule. Income received from teaching, as an insurance broker, as a real estate agent or for rendering accounting services, is not received from the practice of law and therefore should not be deposited in such business account.

COMMENTS: R.R. 1:12-5 now R.1:21-6. See also DR 9-102(C).

Opinion No. 326: Investing Trust Funds (99 N.J.L.J. 298 (April 8, 1976))

The question has arisen whether an attorney may ethically invest funds of a client that he is holding in trust or escrow and, if so, whether he is required to do so.

There is no statute, court rule, or disciplinary rule which expressly or impliedly requires the investment of funds held in trust. Since the facts and circumstances of each individual case are different, any blanket requirement for such investment would, in our opinion, be unwise.

On the other hand, there is no legal or ethical impediment to the placing of trust funds in an interest-bearing account, as long as the requirements of DR 9-102 and R.1:21-6 are satisfied. The American Bar Association's Standing Committee on Ethics and Professional Responsibility has recognized, on at least two occasions, the use of interest-bearing trust accounts. See *Informal Opinion* 545 (1962) and *Informal Opinion* 991 (1967).

It would be advisable for an attorney either to obtain the consent of the client before investing the funds or to notify him of such investment at the time the action is taken. It goes without saying that any such investment must be undertaken with the greatest of care, and only the most secure investments, such as in governmentally-insured bank accounts, should be made. However, it must be clearly understood that any interest or accretion is the property of the client.

Opinion No. 384: Stopping Payment on Attorney's Trust Check to Seller (100 N.J.L.J 1217 (December 29, 1977))

The inquirer asks whether an attorney who has issued his trust check covering balance of sale proceeds due to seller may ethically stop payment after the closing statement was duly approved by all parties and attorneys, for the reason that his client, the buyer, upon taking possession claimed he had found defects in the building.

It is the opinion of this Committee that where parties to a closing agree that the closing obligations have been met and that the monies shall be paid, it is ethically improper to stop payment on the attorney's trust check issued to sellers. Closing funds received upon approval of all parties to distribute must be promptly accounted for and turned over to the persons agreed upon in the absence of a court order to the contrary.

Opinion No. 454: Attorney's Trust Account—Immediate Drawing Upon Depositing Client's Check (105 N.J.L.J. 441 (May 15, 1980))

We are asked whether it is ethical for an attorney to deposit funds belonging to a client in the attorney's trust account and to make immediate disbursement from this fund on behalf of the client. This practice usually arises in the context of a title closing, but there are, of course, many other circumstances in which this procedure is followed.

Rule 1:21-6(a)(1) and DR 9-102 require that an attorney maintain a separate account for funds of his clients entrusted to his care. He must maintain an appropriate book in which the funds belonging to each client are separately identified. It goes without saying that the funds deposited for a particular client must be used for the benefit of that client and for no other purpose. Many attorneys have substantial sums in their trust account at all times, sums which belong to several clients. Some part of these monies are "collected funds," *i.e.*, funds which represent checks deposited in the account which have had ample time to clear and have thus been properly credited to the attorney's trust account. Depending usually on the distance the drawee bank is from the attorney's bank, it may take from five to ten business days for a check to clear, or from one to two calendar weeks. It is obvious, therefore, that a check drawn on the attorney's trust account for client A the same day client A's check is deposited in this account is drawn on funds which belong to other clients of the attorney.

We are aware of the fact that the foregoing practice is one of long standing in probably universal use not only in New Jersey but elsewhere. We also believe that most attorneys who follow this practice do so only where the checks involved are bank, cashier's or certified checks. Because this procedure is so widespread in title closings, to condemn it as unethical may lead to severe disruption in the handling of title closings and other matters. We suggest first, however, that there are other ways to handle these closings, none of which is entirely satisfactory. Three possibilities come to mind: (1) escrow closings in which no funds are disbursed and no closing completed until all funds have cleared; (2) pre-arrangement by the attorneys involved so that the necessary closing figures are known far enough in advance for the parties to provide funds in such a manner as to obviate the necessity of using the trust account (undoubtedly this would require cooperation of the bank-mortgagee which may be asked to provide mortgage funds in several checks); (3) establishment of an account by the attorney of his own funds which can be used to accommodate a client when there is no other solution. Recognizing the problems which would arise were the present practice disapproved in its entirety, it is our opinion that where one of the foregoing solutions is not feasible, the use of bank certified or cashier's checks should be permitted to avoid disruptions in title closings and in the interest of accommodating all clients. Such checks are the obligations of the bank and not simply of a private party. Drawing immediately upon their deposit entails a minimal risk.

The practice which is sanctioned by this opinion has the effect of drawing on unsegregated trust funds of all clients for the benefit of a particular client whose matter is closing. The reduction thus resulting in available trust funds is eliminated shortly thereafter when the bank, certified or cashier's check clears. The justification for what would otherwise be an unauthorized invasion of trust funds consists of the almost non-existent risk that such bank, certified or cashier's checks will not clear along with the overriding commercial need of all clients that such a practice be continued. Because the practice is so well known and widespread, it is fair to assume that clients have implicitly consented to the negligible risk involved in drawing against such checks which have not yet cleared. Of course, any client who explicitly requests that trust funds deposited for his benefit not be subjected to the practice is entitled to have his funds segregated. A consequence of such segregation would be that that client, if

involved in a transaction where closing depends upon the issuance of trust checks that have not yet cleared, would have to make special arrangements similar to one of those suggested earlier in this opinion. In other words, a client who does not want to take the negligible risks involved in the unsegregated fund will not receive the substantial benefit of the practice discussed in this opinion. Approval of the practice referred to herein is limited strictly to real estate or commercial closing transactions representing the consummation of an agreement resulting in transfers of property or interests in property whether they be real estate, personal property or a combination of both, including sales of businesses where it is either essentially or commercially desirable that trustee checks be issued against certified bank or cashier's checks that have not cleared. Drawing on trust funds for other purposes, such as the disbursement of the settlement proceeds of a negligence case, regardless of whether certified, cashier's or bank checks have been deposited but have not yet cleared, is not proper.

We wish to make it clear that the practice we are approving relates not only to the use of bank, cashier's or certified checks. We consider the practice of drawing against personal checks to cover miscellaneous items at closing or for any other purpose, regardless of the amount, to be unethical. While these amounts may be small in relation to the size of some trust accounts, the same amount may be large in relation to other trust accounts. Drawing against such personal checks creates a substantial risk of loss of trust funds deposited in the account for other clients, a risk not in any way justified by necessities of the situation. Accordingly, such practice is disapproved.

Opinion 454—Amendment (114 N.J.L.J. 110 (August 2, 1984))

The Advisory Committee on Professional Ethics has received numerous inquiries concerning its holding in the above matter because the use of checks of savings and loan associations, state or federally-chartered, in connection with real estate or commercial closing transactions was not sanctioned. After careful review of the problems which have arisen because of this exclusion, the Committee has decided that the use of such checks should be approved. Therefore, the first sentence of the last paragraph of Opinion 454 is expanded to read as follows:

> We wish to make it clear that the practice we are approving relates only to the use of bank, *savings and loan (state or federal)*, cashiers' or certified checks.

Opinion No. 537: Attorneys' Trust Accounts: Use Of "Super Now Accounts" (114 N.J.L.J. 68 (July 19, 1984))

The inquirer represents a banking corporation organized and existing under the laws of the State of New Jersey, and in that capacity has submitted to this committee for its opinion the propriety of certain proposed attorneys' bank accounts which the bank has been considering establishing with reference to "escrow accounts for attorneys." The factual situation for consideration presented by the inquirer is as follows.

The Bank desires to offer interest bearing escrow accounts for attorneys. Each attorney or law firm will have a master account under which there will be subsidiary accounts for each client. Also, one of the subsidiary accounts will be designated as the attorney's account to be used exclusively for the deposit of the attorney's money and debited for service charges, return items, etc., incurred in connection with the master account. Each subsidiary account, including the attorney's subsidiary account, will bear its own account number (e.g. if the master account number is 100, the subsidiary accounts might be 100-1, 100-2 . . . etc.).

It is anticipated that the master account will be a "Super Now Account," which earns money market account interest rates. The attorney will be required to make an initial deposit in the amount of $1,000.00 of his own money into his subsidiary account, together with an initial deposit in the amount of at least $1,500.00 of clients' funds to be deposited into clients' subsidiary accounts, thus satisfying the required minimum initial deposit of $2,500.00. The Federal Reserve Bank of New York has advised me that the master account will be deemed one account for purposes of determining the required initial deposit in the amount of $2,500.00.

The attorney's subsidiary account will not earn interest, but rather, the $1,000.00 balance will be required to be maintained to compensate the Bank for the accounting services, which it will provide for the attorney at no cost, in connection with the master account. The Federal Reserve Bank of New York has approved this provision.

The inquirer further advises that:

The attorney will furnish the Bank with certain information regarding his clients (e.g. name, address, social security number, nature of deposits and disbursements, nature of the case or manner in which the client is being represented, etc.) Clerical employees of the bank will have access to this information.

The questions that have been raised are as follows:

1. Will the proposed bank account violate DR 9-102?

2. Do the bookkeeping services provided by the Bank violate DR 4-101 pertaining to the preservation of confidences and secrets of a client?; and

3. Will the monthly account statement provided by the bank to the attorney comply with the required bookkeeping records described in R.1:21-6(b)?

DR 9-102 provides in part as follows:

(A) All funds of clients paid to a lawyer or law firm, other than advances for costs and expenses, and all escrow funds, shall be deposited in one or more identifiable

bank accounts maintained in this State, and no funds belonging to the lawyer or law firm shall be deposited therein except as follows:

(1) Funds reasonably sufficient to pay bank charges may be deposited therein.

(2) Funds belonging in part to a client, a portion of which the lawyer or law firm will be entitled to receive for his own use must be deposited therein, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

We are of the opinion the proposal as presented appears to be in compliance with DR 9-102 in that the escrow funds are to be deposited in one or more identifiable bank accounts maintained in this state and apparently are to be kept segregated from the attorney's personal funds. The identification of the subsidiary accounts with separate subsection numbers as set forth in the proposal appears to comply with the requirement of "identifiable bank accounts." The attorney's own funds required to be deposited in the master account and to be used for the purposes set forth in the facts, namely: "This account to be debited for bank charges and the required balance will be deemed consideration in lieu of fees charged for the accounting services provided," appears to be in conformity with DR 9-102(A)(1).

With respect to inquiry #1, therefore, we are of the opinion that there would be no ethical violation if the accounts were to be maintained as presented by the recited facts. The earnings thereon, of course, would be the property of the client.

It is not within our jurisdiction, however, to render an opinion as to whether the suggested bank account or accounts would be in compliance with R.1:21-6 and the various subsections thereof. In this regard, we suggest that the format be presented to the Administrative Office of the Courts for consideration and approval.

The second question that has been presented is as follows:

Do the bookkeeping services provided by the Bank violate DR 4-101 pertaining to the preservation of confidences and secrets of a client?

DR 4-01(a) defines "confidence" and "secret" as follows:

(A) "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

It should be noted that the bank intends that "the attorney will furnish the bank with certain information regarding his clients (e.g. name, address, social security number, nature of deposits and disbursements, nature of the case or manner in which the client is being represented, etc.). Clerical employees of banks will have access to this information." Such disclosure would constitute a breach of a client's "confidentiality." DR 4-101(c), in our opinion, provides the solution to the prohibition against disclosure of confidential information required by the bank. DR 4-101(C) provides, in part, as follows:

> (C) A lawyer may reveal:
>
> (1) Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them.

Therefore, upon compliance with DR 4-101(C)(1), the information could be supplied to the bank. From a practical viewpoint, and without regard to the question of compliance with or breach of the rule of confidentiality, it appears to this committee that such consent should be sought, in any event, in the first instance. If the client does not wish to have the requested information disclosed, when certainly the attorney should not, and could not, do so. We, therefore, hold that absent consent, the requested information comes within the rule of confidentiality.

The inquirer suggests that the "Bank's bookkeeping services require disclosure in order to confirm with the requirements of the New Jersey Court Rules concerning attorneys' record keeping." This is a matter of administrative requirements and is not within the province of this Committee.

The third inquiry is stated as follows:

Will the monthly account statement provided by the Bank to the attorney comply with the required bookkeeping records described in R.1:21-6(b)?

We must decline to answer this question on the grounds that the same does not come within our jurisdiction and is a matter of law which should be submitted to the Administrative Office of the Courts.

Opinion No. 574: Investment of Trust Funds (116 N.J.L.J. 353 (September 12, 1985))

An attorney raises a question as to whether funds held by an attorney temporarily pending the closing of a real estate deal may be placed in a U.S. Government securities fund.

Both RPC 1.5(a) and R.1:21-6(a) make it clear that such funds may be invested only in New Jersey financial institutions. Such institutions are defined as banks, savings and loan associations, credit unions, and savings banks. The Merrill Lynch Government Fund and other

similar funds do not qualify, and an attorney may not deposit money for real estate closings in such funds.

Opinion No. 574—Supplement: Investment of Trust Funds (116 N.J.L.J. 721 (December 5, 1985))

Subsequent to the publication of *Opinion* 574, 116 N.J.L.J. 353 (1985), the Advisory Committee on Professional Ethics received a number of inquiries from law firms seeking guidance as to whether the prohibition on investing escrow monies other than as stated in R.1:21-6(a) and RPC 1.15(a) extended to parties who specifically requested that the funds be invested in securities or properties different from those permitted by the above rules. The Committee wishes to emphasize that the *Opinion* deals only with situations where the lawyer has the responsibility of investing the funds and not those in which all interested parties direct the investment.

Opinion No. 582: Attorney Trust Account: Payment of Interest to Clients and Law Firm (117 N.J.L.J. 394 (March 27, 1986))

The inquirer initially submitted the following question for consideration by the Committee; namely: "May we pay interest to our clients and our firm on monies in our trustee account belonging to each?"

The recitation of the facts, however, indicates that, basically, the question involves the distribution of monies received by way of settlement or judgment in personal injury matters with reference to the cases handled on a contingent basis. The inquirer states:

> The practice of our office consists largely of representing persons in personal injury matters. Due to the nature of this practice, our cases are handled on a contingent basis, upon the successful conclusion of each matter, we receive checks that are payable to our clients and ourselves. Pursuant to the Court Rule and Supreme Court Directives, it is our policy to have the client endorse each check as it is received after which the check is deposited in our trustee account for a 10-day period. At the conclusion of the 10-day period, checks are issued from our trustee account to the client for his portion of the recovery and to the firm for reimbursement of costs advanced and for our fee.
>
> As a result of the substantial volume of tort matters that our office handles, there is always a large balance in our trust account which draws no interest but is most beneficial to our bank at the expense of our clients and our firm whose money the bank is able to use.
>
> We have pointed out the inequities of the above situation to our bankers, as a result of which the bank has agreed to pay interest on the money in our trust

> account based upon a negotiated formula. As far as we can determine, there is no prohibition in the Court Rules or the Rules of Professional Conduct which would prevent interest from being paid on our trust account. In fact, R.1:21-7(d) specifies that attorneys' contingent fees may also be calculated on post judgment interest received.
>
> In light of the above, it is our desire to pay our clients interest on their portion of the money deposited in our trust account from the day of its deposit to the day the money is disbursed to pay to our office the interest on that portion of the money deposited in our trustee account that represents our fees and cost reimbursement.

In our opinion, the interest that is earned on the client's portion of the monies received by way of settlement or in payment of a judgment must be paid to the client. In *Opinion 326*, 99 N.J.L.J. 298 (1976), the question had been raised as to "whether an attorney may ethically invest funds of a client that he is holding in trust or escrow and, if so, whether he is required to do so." We held as follows:

> There is no statute, court rule, or disciplinary rule which expressly or impliedly requires the investment of funds held in trust. Since the facts and circumstances of each individual case are different, any blanket requirement for such investment would, in our opinion, be unwise.
>
> On the other hand, there is no legal or ethical impediment to the placing of trust funds in an interest-bearing account, as long as the requirements of DR 9-102 and R.1:21-6 are satisfied. The American Bar Association 's Standing Committee on Ethics and Professional Responsibility has recognized, on at least two occasions, the use of interest-bearing trust accounts. See Informal Opinion 545 (1962) and Informal Opinion 991 (1967).
>
> It would be advisable for an attorney either to obtain the consent of the client before investing the funds or to notify him of such investment at the time the action is taken. It goes without saying that any such investment must be undertaken with the greatest of care, and only the most secure investments, such as in governmentally-insured bank accounts, should be made. However, it must be clearly understood that any interest or accretion is the property of the client.

In further support of our conclusion, we refer the inquirer to our *Opinion 537*, 114 N.J.L.J. 68 (1984) dealing with attorneys' trust accounts and the matter of interest relating thereto.

The reality of the relationship is such that actually, when the settlement draft or draft in payment of a judgment is received and deposited, the same represents monies belonging to the

client less the monies due the attorney pursuant to the contractual relationship with the client. The receipt, deposit, and allocation should be considered to be effective immediately, subject, of course, to the collection of funds. The interest that accrues from the day of deposit, therefore, belongs to each of the parties, calculated on the basis of the amount of principal due to each of them upon distribution.

Subsequent to the initial inquiry, the inquirer then posed the following plan to compute the interest:

> Our bank is willing to pay us interest through guaranteed, insures "re-purchase agreements." The interest will be paid daily on all "investments" over $100,000 after an $85,000 threshold has been met. Accordingly, if approved, we would like to use the following plan to compute the interests: We would calculate the average daily balance in our trust account on which interest would be paid and keep a running calendar of those balances. Additionally, we would also maintain a running calendar of the percent of interest paid each day.
>
> When we are ready to disburse monies which had been in our trust account, we would calculate the average daily balance from the date the money was deposited until the date the disbursement was made to the client. We would also calculate the average daily amount of investible funds, i.e. each day's balance minus $85,000 (providing there is at least $100,000).
>
> At this point, we would calculate the following proportion: (A) The settlement (or verdict) deposit is to (B) the average daily balance as (X) the calculated figure on which that client's interest is calculated is to the (C) average daily investible amount = A/B = X/C.
>
> At this point, we would get the average percent of interest paid from the date of the deposit until the date of the disbursement. That would be multiplied to (X), the amount of money on which the client's interest would be calculated. That answer would give the amount of yearly interest. Accordingly, we would calculate the daily interest from that and multiply that by the total number of days that the money was in the trust account.
>
> The figure then obtained would be the full amount of interest generated while any given deposit was in the trust account. Accordingly, our share would be the same percentage as our fee based on the fee schedule promulgated by the Supreme Court. (e.g. 25% for infants; 33⅓% on other cases up to $250,000, etc.).
>
> We would pay interest from the actual date of deposit until the actual date of our disbursement, even though we would probably not generate interest until after the second day of any deposit. The reason for this would be an attempt to

> compensate the client for any interest which may accumulate in the event of a float.
>
> It would be impossible to calculate any interest exactly after disbursement because we have no way of knowing when the check to the client is actually cashed and any follow-up would be impractical. However, we would in our disbursement, include all of the interest in the check given to the client.

If we understand the formula correctly, there would be a period of time between the date of disbursement made by the law firm to the client and the clearance of the draft or check so issued, during which time the interest would accrue on that amount for the benefit of the law firm. This is commonly known as a "float." In our opinion, this would be improper and, in effect, if permitted, would result in the law firm receiving interest on monies belonging to the client.

It is not the function of our Committee to establish methods of operation. However, we do suggest that the client be advised that his or her draft would be available for immediate delivery by the attorney in order that the client can then make a decision as to whether to open an interest-bearing account in the same institution as the attorney's trust account is maintained on the day of delivery; to arrange with the client's own bank regarding the payment of interest on the monies; to immediately cash the draft (which may not be practical) or to take such other steps as may be advisable to gain the advantage of earnings on the monies received. It probably would be advisable that the client be informed that additional interest will accrue from the date of disbursement or delivery of the check to the date when the check clears the bank and that the attorney will forward an additional check for the accrued interest as soon as the amount is determined.

In any event, the client should be fully advised and informed of the situation and if the client elects to deposit the disbursement draft without regard to the matter of interest, then written approval should be obtained from the client.

Opinion No. 598: Deposit of Withheld Employment Taxes in Trust Account (119 N.J.L.J. 505 (March 26, 1987))

The inquirer, a sole practitioner with one employee, asks whether payroll taxes withheld for his employee's wages may be deposited into the attorneys trust account. The inquirer disagrees with the position of the Office of Attorney Ethics to the effect that the monies may not be so deposited, as set forth in a manual entitled *Trust and Business Accounting for Attorneys* written by the Director of the Office of Attorney Ethics in consultation with the Auditor-in-Charge. The manual was prepared in cooperation with the New Jersey State Bar Association, and we are informed it is used as instructional material in conjunction with a continuing education course.

The term "payroll taxes" is a phrase used by the inquirer and basically refers to the deductions to be made from an employee's salary which are required by Federal and State laws and which relate to withholdings for Social Security, income taxes and State unemployment insurance. In this regard, it is to be noted that an employer is required to withhold and deduct from an employee's wages the employee's contribution as reacquired by law, and is also required to pay as his or her direct obligation the employer's contribution as required by law. Therefore, it follows that there are two funds involved for which the employer becomes liable for payment to the respective governmental authorities: the employee's share and the employer's share. We agree with the Office of Attorney Ethics. Under our Professional Rules of Conduct, the attorney's trust account should not be used as a depository for either fund. RPC 1.15(a) states, in pertinent part, that:

> 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 a separate account maintained in a financial institution in New Jersey.

The Rule relates to monies in the possession of the lawyer "in connection with representation." There is no attorney-client relationship involved in the subject matter of the present inquiry. Therefore, in the absence of an attorney-client relationship, monies belonging to others should not be deposited in the attorney's trust account. Additionally, the Rule specifically prohibits the "commingling of funds"; i.e., the lawyer's own monies with that of clients.

There is no question but that the inquirer's obligation for the employer's contribution represents his own funds, and to deposit those funds in his attorney's trust account would clearly constitute commingling.

If it is contended that the employer is a trustee in behalf of the respective governmental authorities of the funds which constitute the employee's contribution, then the deposit of such funds in the attorney's trust account would be violative of R. 1:21-6(a), which provides with reference to required bank accounts that:

> (a) Required Bank Accounts. Every attorney who practices in this state shall maintain in a financial institution in New Jersey, in the attorney's own name, or in the name of a partnership of attorneys, or in the name of the professional corporation of which the attorney is a member, or in the name of the attorney or partnership of attorneys by whom employed:
>
> (1) a trustee account or accounts separate from any business and personal accounts and from any fiduciary accounts that the attorney may maintain as executor, guardian, trustee, or receiver or in any other fiduciary capacity, into which trustee account or accounts funds entrusted to the attorney's care shall be deposited; . . .

Opinion No. 609: Postdating Trust Account Settlement Checks (120 N.J.L.J. 1113 (December 10, 1987))

The issue presented is whether it is ethical under RPC 1.15 and R.1:21-6 for an attorney to postdate an attorney trust account check given to a client or to another attorney in a personal injury settlement.

According to the inquirer, in tort cases the settlement draft which is ordinarily made payable to both the claimant and the attorney for the claimant [*In re Conroy*, 56 N.J. 279, 282 (1970)] is properly deposited in the attorney's trust account after endorsement. In order to minimize inconvenience to the client, the inquirer states that there is a practice of giving the client a *postdated* check for the claimant's net share of the recovery. Where a contingent fee is charged, a recovery statement must be issued to the client under R.1:21-7(g), see also RPC 1.5(c), and it is convenient to accomplish all of these purposes when the client comes in to endorse the check for deposit.

Of course, it would be improper to draw upon these funds until the check has cleared as we have expressly held in *Opinion 454*, 105 N.J.L.J. 441 (1980), and this is true even where the instrument is certified or is a cashier's or bank check representing the settlement proceeds of a negligence case.

The inquirer suggests that the issuance of postdated checks to a point in time such as ten days or two weeks to allow time for clearance is permissible and ethical, perceiving the only "slight risk" as being the unauthorized negotiation of a postdated check prior to the date stated. We disagree. The Supreme Court has been especially sensitive to the matter of attorney record keeping and bank accounts, particularly attorney trust accounts. R. 1:21-6. The real hazard lies in the fact that the instrument may be dishonored or fail to clear for any one of a variety of reasons, and in such case the postdated check will, when presented, result in a draft upon the funds of others or, if such funds are not available, be itself dishonored. Unlike the narrow situation presented and passed upon in *Opinion 454*, *supra* which is carefully limited to property transactions, there is no compelling commercial or social need of such overriding importance in the distribution of the proceeds of recovery in tort cases. Except for the maintenance of sound client relations, there is no reason why the client should be required to come to the lawyer's office twice. The claimant's check can be mailed after the deposit has cleared. We do not regard *N.J.S.A.* 12A:3-114 as evidence that the Legislature intended to sanction the use of postdated checks generally; that statute merely preserves the "negotiability" of such instruments.

Accordingly, we hold that it is improper for an attorney to issue any checks drawn upon an attorney's trust account until the instrument representing the funds against which the check or checks are drawn has in fact cleared.

Opinion No. 635: Use of Authorization to Endorse Forms in Personal Injury Matters (124 N.J.L.J. 1460 (December 7, 1989))

A law firm proposes to use an Authorization to Endorse form which it has prepared. It is proposed to have the clients execute the form when they come to the law firm's offices to execute a release and disbursement statement, incident to the settlement of litigation, in order to permit the attorneys to endorse for deposit the settlement draft made payable to the client and to deposit the proceeds in the attorneys' trust account following full disclosure to the client. This is in response to a client's query as to whether there is a method whereby the client may avoid the inconvenience of returning to the law firm's office to endorse the settlement draft or that of the time lag involved if such instruments are sent to them by mail, and in that way expedite disbursement of the settlement proceeds.

Our attention was directed to our Supreme Court's opinion, *In the Matter of John S. Conroy, III*, 56 N.J. 279 (1970), in which the attorney included in his retainer agreement a provision giving him "full power. . .to execute any draft or check in (client's) behalf and to make disbursements of the proceeds covering all medical and hospital bills and to retain ___% of the total received if settled, and ___% if trial is had."

The Court decided at page 282 of its opinion as follows:

> We pause at this point to make clear that we consider employment by members of the bar of the type of retainer and power of attorney described above to be highly improper. The practice of insurance carriers or other settlors in drawing settlement checks in the joint names of the attorney and the claimants is to protect and preserve the interests of all three parties to the transaction. The form of retainer in question facilitates the subversion of that purpose and is unqualifiedly disapproved.

This inquiry presents a different factual situation than that presented in the Conroy matter. Here, the inquirers propose to use the power of attorney, at the request and with the consent of the client, to permit them to endorse the client's name on the check or draft for the amount of settlement and to deposit the check in the attorneys' trust account to facilitate disbursement of the proceeds. The power of attorney authorizing this procedure is to be executed at the request and with the consent and knowledge of the client after settlement has been consummated, and after the client has signed the closing statement as required by R.1:21-7 or RPC 1.5(c), as the case may be.

R.1:21-7 relating to contingent fees requires that in matters where the client's claim for damages is based upon the alleged tortious conduct of another, contingent fee arrangements are required to be in writing in the form prescribed by the Administrative Director of the Courts and signed by both the attorney and client. It also requires that upon the conclusion of the matter,

resulting in a recovery, the attorney shall prepare and furnish the client with a signed closing statement, likewise in the form prescribed by the Administrative Director of the Courts.

RPC 1.5(c) in effect extends the contingent fee rule to all other matters with respect to which contingent fees are agreed upon, except it does not provide for percentage limitations on the attorney's fees.

RPC 1.5(b) provides:

> When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated in writing to the client before or within a reasonable time after commencing the representation.

In all litigated matters, the attorney who appears in the cause for the party who institutes the action, or maintains the third-party claim, or counterclaim or crossclaim, has a lien for compensation upon his client's action which attaches to a verdict or judgment in his client's favor, which lien is not affected by any settlement between the parties before or after judgment or final order. *N.J.S.A.* 2A:13-5.

It is because of the attorney's lien that checks or drafts made to satisfy a judgment or to complete a settlement are made jointly payable both to the clients and the attorney who handled the matter. The payor includes the attorney's name on the draft or check to insure that the attorney's lien is satisfied.

The requirements with respect to fee agreements and closing or written statements showing the remittance to the client and the method of its determination make the client aware of the amount of the recovery which the client is entitled to receive. If after that has been done, the client for his own convenience executes a written authorization permitting his attorney to endorse the settlement draft or check received in settlement of the matter or in satisfaction of a judgment and to deposit same in the attorney's trust account for the sole purpose of disbursing the funds in accordance with the closing statements, we see nothing improper in such a procedure.

Opinion 635—Notice to the Bar (136 N.J.L.J. 1638 (April 25, 1994))

In *Matter of ACPE Opinion 635*, 125 N.J. 181 (1991), the Supreme Court held that the endorsement authorization procedure for personal injury matters contemplated by the Advisory Committee on Professional Ethics in *Opinion 635*, 124 N.J.L.J. 1420 (1989), should not be adopted except in extraordinary circumstances that might justify the use of a power of attorney, such as when a client is on the eve of departure for an extended stay in a foreign land or when a client is about to undergo surgery with a doubtful prognosis and an extended hospital stay to follow. In its opinion, the Court noted with approval an alternative procedure adopted by the New York Department of Insurance.

The State Department of Insurance has recently adopted N.J.A.C. 11:2-17.11, which follows the New York regulation in that it requires insurers, at the same time payment of a third-party claim is being made, to provide written notice of payment to the claimant. With the adoption of N.J.A.C. 11:2-17.11, the concerns voiced by the Court in its decision have been addressed. Consequently, the Bar is hereby advised that if the requirements of the new regulation are followed, the attorneys may, in personal injury matters only, use authorization to endorse forms.

Stephen W. Townsend, Esq.
Clerk of the Supreme Court

Opinion No. 644: Nonrefundable Retainers (126 N.J.L.J. 966 (October 11, 1990))

The issue presented by this inquiry is whether it is ethically permissible for an attorney to charge a nonrefundable retainer "under any circumstances." In considering this question, we have had the benefit not only of the authorities advanced by the inquirer, but also of the report of an Ad Hoc Committee on Non- Refundable Retainers which was established by the State Bar Association for the purpose of developing a response to the inquiry. We conclude, as did the Ad Hoc Committee, that nonrefundable retainers are not unethical per se but are subject always to the overriding precept that any fee arrangement must be reasonable and fair to the client.

The applicable Rules of Professional Conduct do not deal explicitly with the subject of nonrefundable retainer fees. RPC 1.5 provides that "(a) lawyer's fee shall be reasonable," and goes on to enumerate eight factors to be considered in determining reasonableness. Among these are several which are extrinsic to the actual performance of legal work, notably including "the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer." RPC 1.5(a)(2). This factor inferentially supports the view that a retainer may be fully earned, and therefore nonrefundable, when the attorney stands ready to provide the anticipated representation, whether or not it actually materializes. *See Conover v. West Jersey Mortgage Co.*, 96 N.J. Eq. 441, 451 (Ch. 1924). It does not, however, answer the question directly.

RPC 1.16(d) deals with the termination of representation, and requires "refunding of any advance payment of fee that has not been earned." But this Rule does not address the question of whether or under what circumstances a fee may be considered "earned" upon receipt, and thus does not by its terms preclude nonrefundable retainers.

As the inquirer tells us, the available case law on this subject is "scant, conflicting and ambiguous." Our own Supreme Court, however, has had occasion to consider in a disciplinary context whether funds paid by a client to an attorney in anticipation of legal services to be rendered may be deposited in the attorney's business account as his own money, or must be held in the attorney's trust account as funds of the client. *In re Stern*, 92 N.J. 611 (1983). Noting that the then-applicable Disciplinary Rule [DR 9-102(a)] generally required that all funds of clients paid to a lawyer must be deposited in the attorney's trust account, the Court framed the

question before it as "whether the retainer fees collected by respondent constituted funds of the client, funds of the attorney, or both within the meaning of DR 9-102(A)." *In re Stern*, supra, 92 N.J. at 618. In response to that question, the Court observed that

> "[t]he traditional view in New Jersey was that 'in the absence of an express understanding to the contrary, [a retainer fee] is neither made nor received in payment of services contemplated. . . . [I]t is a fee paid to counsel to make sure that he will represent and render service to his client in a given matter or matters."

Ibid, citing *Conover v. West Jersey Mortgage Co.*, supra, 96 N.J. Eq. 441, 451. Stating that "today's definition is not so clear," the Court looked to the intention of the parties and found that "[u]nder that test, the record is inadequate to determine whether the sums received. . .were to be treated as trust funds." *In re Stern*, supra, 92 N.J. at 618-19. The Court concluded:

> In New Jersey it has not been held that a general retainer fee must be deposited in a trust account. DR 9-102(A) does not clearly call for its deposit. We adhere to that view pending our review and action upon the report and recommendations of the Supreme Court Committee on Model Rules of Professional Conduct, and hold that absent an explicit understanding that the retainer fee be separately maintained, a general retainer fee need not be deposited in an attorney's trust account. Id. at 619.

The Committee on the Model Rules of Professional Conduct, in its report delivered during the month following the Stern decision, responded directly to the Court's statement as follows:

> Model Rule 1.15, entitled "Safekeeping Property," defines the obligations of the attorney as to the holding of property of clients or third persons. . . . .
>
> ***
>
> In [*In re Stern*, supra, 92 N.J. 611], the Supreme Court requested this Committee to consider whether a retainer fee paid by the client toward future services by the attorney should be separately maintained until earned. The Committee considered this question at length and recommends continuation of the rule that a retainer fee need not be deposited in the attorney's trust account. Requiring deposit of such funds in a trust account would not prevent attorneys from failing to perform work that they have undertaken. Further, such a requirement would interfere significantly with the variety of retainer fee arrangements that have served the interests of both attorneys and their clients. Reference is here made to Model Rule 1.5(b), which, in its recommended form, would require that "the basis or rate of the fee shall be communicated in writing to the client before or within a reasonable time after commencing the representation." . . .If the Supreme Court

> concludes that advance fee payments require additional control, it might consider supplementing the just-quoted Rule 1.5(b) so as to provide that the attorney's written fee communication must include what is to be done with any such advance payments." (Emphasis added).

Sup. Ct. Comm. Report on the Model Rules of Prof. Conduct, 112 N.J.L.J. 93, Supp. p. 24 (July 28, 1983).

The Committee's view was adopted by the Court, and present RPC 1.15, "Safekeeping Property," consequently does not require retainer payments to be deposited in lawyers' trust accounts. The Court also concurred in the Committee's recommendation concerning mandatory written communication to clients of the basis or rate of a fee, and RPC 1.5(b) now so provides with respect to clients whom an attorney has not regularly represented. The Court did not, however, adopt the Committee's further suggestion that the disposition of advance payments be included in such written communications.

Concededly, the Stern case, the response thereto by the Committee on the Model Rules and the ensuing adoption of RPCs 1.5(b) and 1.15 in their present forms, do not squarely resolve the issue before us. However, the explicit rejection of the trust fund approach by both the Court and its Committee, particularly in view of the Committee's above-quoted reference to "the variety of retainer fee arrangements that have served the interests of both attorneys and their clients," supports the conclusion that in New Jersey the disposition of retainer fees may properly be the subject of fair and informed agreement between the parties to that relationship. Accordingly, we hold that it is not unethical per se for an attorney to charge a nonrefundable retainer, provided that such a fee arrangement is fair and reasonable under the circumstances of the particular representation. RPC 1.5; *see also American Trial Lawyers Ass'n v. New Jersey Supreme Court*, 126 N.J. Super. 577, 591 (App. Div. 1973).

Finally, we note the Ad Hoc Committee's recommendation that we condition our ruling on nonrefundable retainers upon compliance by the attorney with a specific set of requirements which we believe would be better addressed by appropriate amendments to the Court Rules. Indeed, the Committee goes on to recommend adoption of the same requirements in the form of a new Rule of Civil Practice. We would only observe that we concur fully with the Committee's view that an initially reasonable nonrefundable retainer arrangement may become unreasonable because of subsequent unforeseen circumstances, such as the sudden death of a client resulting in an abatement of the action. Clearly the unused portion of even a nonrefundable retainer should be returned if contravening events should render it unconscionable for the attorney to keep it.

Opinion Number 659: Attorney with Large Collection Practice Entering into Agreements Whereby Client Waives Accrued Interest Generally, or In Exchange for a Reduction in the Contingent Fee Ordinarily Charged (130 N.J.L.J. 658 (February 24, 1992))

The Inquirer is a partner in a law firm which concentrates its practice in collection services and attendant litigation. Most of its clients are large financial and regional retailers, banking institutions, utilities and other companies engaged in businesses wherein credit is extended to their customers.

The Inquirer informs us that the firm's average collections are approximately $9 million per year and that they deposit more than 70,000 checks and money orders annually. They institute approximately 20,000 lawsuits, most of which are in Special Civil Part of Superior Court. As a result of these lawsuits, there are executions and orders typical of collection practice.

The firm's fees are contingent upon its collecting funds. These are remitted to clients not less often than monthly and, in connection with larger clients, as frequently as once a week.

The practice in remitting is usually established by agreement with the financial officers of the client firm. The Inquirer assures us that the firm's practices conform to the Rules of Professional Conduct. In order to ensure continued compliance, he requests answers to the following three questions:

1. May a client in a written fee agreement with an attorney agree to waive interest earned, if any, on client's Trust monies recovered or held by the attorney for or on the client's behalf in a non-IOLTA interest bearing General Attorney Trust Account? The result of this practice would be that the attorney would receive the benefit of any such interest.

2. May the attorney and the client agree that the client will waive interest in exchange for a reduction in the contingent fee that the attorney would otherwise charge the client?

3. May an attorney invest client's Trust funds that are held in a General Attorney Trust Account overnight with a federally insured financial institution in "Repo Agreements" that are collateralized by U.S. Treasury Bills, or by equally secure governmentally backed collateral?

The answer to all three inquiries is in the affirmative. Given the representation by the Inquirer that all of these actions are with the knowledge and consent of the clients, they are ethically acceptable.

In our Opinion 326, 99 N.J.L.J. 298 (1976), we outlined the parameters of lawyers investing trust funds. We said that such investments must be secure and be made in governmentally backed accounts. While REPO Agreements were not referred to in Opinion 326,

and not all of those proposed by Inquirer would qualify, U.S. Treasury Bills or other governmentally backed collateral would provide the kind of security demanded by said Opinion.

Obviously, since the Inquirer is dealing with very sophisticated clients, there can be no objection to the conduct referred to providing there is consent by the clients after full disclosure.

In closing, we call the Inquirer's attention to R. 1:21-6(b)(3) which requires attorneys to maintain copies of retainer and compensation agreements with clients. The agreements with clients referred to in Questions 1 and 2 should be in writing and available for inspection as required by said Rule.

Opinion 687: Drawing Upon and Disbursing Funds Received at Real Estate Closings in the Form of Negotiable Instruments Other Than Cashier's or Teller's Checks (159 N.J.L.J. 454 (January 31, 2000))

The Advisory Committee on Professional Ethics has been asked whether negotiable instruments designated by certain financial institutions as "official checks", and received by attorneys in connection with real estate closings, may permissibly be drawn upon and disbursed immediately upon deposit. The inquiry necessitates review of Opinion 454, 105 *N.J.L.J.* 441 (1980) and the public policy supporting its holding, to decide whether an extension of Opinion 454 is warranted to cover these additional instruments expressly. We conclude that it is not.

Ordinarily, clients' funds may not be disbursed from an attorney's trust account until they have been "collected", meaning that the checks have cleared, the funds have been credited to the attorney's trust account, and they are immediately available. Disbursement of funds not collected and available is an extremely serious ethical matter. *See R.* 1:21-6(1)(2) (approved financial institutions shall file with the Office of Attorney Ethics a report "in the event any properly payable attorney trust instrument is presented against insufficient funds, irrespective of whether the instrument is honored[.]"). Where the funds of several clients are kept in one account, the disbursal of funds prior to collection may result in the improper disbursal of other clients' funds. *See, e.g., Matter of Hollendonner,* 102 *N.J.* 21 (1985) (discipline imposed for issuance of checks against uncollected funds).

In Opinion 454, *supra*, 105 *N.J.L.J.* 441, the Committee examined the practice of immediately drawing upon funds received at real estate closings, observing it was "one of long standing... probably universal use not only in New Jersey but elsewhere." *Ibid.* Because the practice was so widespread in title closings, the Committee realized that "to condemn it as unethical may lead to severe disruption in the handling of title closings and other matters." *Ibid.* Therefore, the Committee approved such immediate disbursements when the funds deposited were in the form of "bank, cashier's or certified checks," in order to avoid disruptions in title closings and in the interest of accommodating all clients." We did so because "[s]uch checks are the obligations of the bank and not simply of a private party. Drawing immediately upon their deposit entails a minimal risk."

It was with great reluctance, however, that the Committee approved this very limited exception to the rule that trust account checks be drawn on collected funds. The Committee recognized the practice "has the effect of drawing on unsegregated trust funds of all clients for the benefit of a particular client whose matter is closing." *Ibid.* The Committee concluded the "justification for what would otherwise be an unauthorized invasion of trust funds consists of the almost non-existent risk that such bank, certified or cashier's checks will not clear, along with the overriding commercial need of all clients that such a practice be continued." *Ibid.*

The Committee made informal inquiry into the practices of several financial institutions with regard to "official checks." This inquiry revealed that bank practices vary significantly as to when checks drawn by other banks were credited, what they were called and what they signified. The term "official check," unlike "cashier's check" (a check drawn by a bank on itself), or "teller's check" (a check drawn by a bank on another bank, or payable through another bank), does not appear in any New Jersey statute, or have any settled legal definition. Informal inquiry also revealed that other terms, such as "bank check", are also used by some institutions. The Federal Reserve Board, in its regulations concerning next day availability of funds, recognizes only teller's checks and cashier's checks, although it apparently recognizes some forms of official checks as teller's checks. Nor is there a consistent, universal practice as to when funds from such checks actually are made available.

Unlike the situation in Opinion 454, therefore, there is not a single, universally recognized definition of "official check." Consequently, it is not possible to issue a ruling of general application endorsing or barring disbursement from deposits of such checks, or to give blanket approval to instruments which bear the name "official checks." Nor is it practical for this Committee to examine individually each new variation of negotiable instrument which may be developed by banking institutions. Rather, building upon our analysis in Opinion 454, our appropriate role is to clarify the principles which must guide private attorneys as they judge whether it is ethically permissible to disburse based upon deposited funds. Ultimately it is the actual substance of the instrument, not its label, which must control.

To be permissible, such immediate disbursal of a negotiable instrument must be the virtual equivalent of collected funds. Immediate disbursement can take place only in the following circumstances:

(1) The check must be drawn by a licensed banking institution on itself or another such banking institution.

(2) The attorney must ascertain that the funds from the check will be made available by the depository bank no later than the next business day after the day of deposit.

We also emphasize and make explicit one additional limitation on this already very limited exception to the general rule that trust account disbursements may be made only from

collected funds. Before making any disbursement on the deposited funds prior to the time they actually become available, the attorney must determine that the contemplated disbursements related to the deposited funds, taken together with all other actual and reasonably anticipated disbursements during the period prior to such actual availability, will not exceed the total funds that the attorney's trust account drawee bank will make available during that period.

We note that the rapidly developing practice of wiring funds into a trust account may, as a practical matter, eliminate the timing and availability difficulties posed by paper checks.

This opinion will be effective April 28, 2000.

APPENDIX G. LIST OF APPROVED ATTORNEY TRUST ACCOUNT DEPOSITORIES

Attorney Trust Account Depositories

Set forth below is a list of financial institutions which have filed agreements pursuant to Rule 1:21-6 with the Supreme Court of New Jersey as of February 1, 2008. These institutions qualify as depositories for attorney trust funds. It is anticipated that additional institutions will file agreements throughout the year. Their names will be published periodically in the New Jersey Law Journal and New Jersey Lawyer. Attorneys having questions as to whether or not a particular financial institution not shown below has filed an agreement with the Court may (1) request and rely upon a copy of the executed agreement from the financial institutions or (2) call the Office of Attorney Ethics at 609-530-4008.

David E. Johnson, Jr.
Director
Office of Attorney Ethics

APPROVED BANKS AS OF FEBRUARY 1, 2008

1st COLONIAL NATIONAL BANK
1st CONSTITUTION BANK
ABACUS FEDERAL SAVINGS BANK
ALLEGIANCE COMMUNITY BANK
AMALGAMATED BANK
AMBOY NATIONAL BANK
AMERICAN BANK OF NEW JERSEY
ATLANTIC STEWARDSHIP BANK
AUDUBON SAVINGS BANK
BANCO POPULAR NORTH AMERICA
BANK OF AMERICA
BANK OF NEW JERSEY
BANK OF PRINCETON (THE)
BANK ONE
BCB COMMUNITY BANK (formerly Bayonne Community Bank)
BENEFICIAL SAVINGS BANK
BOARDWALK BANK
BOGOTA SAVINGS BANK
BOILING SPRINGS SAVINGS BANK
BNB BANK, N.A. (formerly Broadway National Bank)
BRUNSWICK BANK AND TRUST CO.
CAPE SAVINGS BANK
CAPITAL BANK OF NEW JERSEY
CATHAY BANK
CENTRAL JERSEY BANK, N.A.
CENTRAL JERSEY FEDERAL CREDIT UNION
CENTURY SAVINGS BANK
CHINATRUST BANK (USA)
CITIBANK, FSB
CITIZENS BANK
CITIZENS COMMUNITY BANK
CITY NATIONAL BANK OF NEW JERSEY
CLIFTON SAVINGS BANK, SLA
COLONIAL BANK, FSB
COLUMBIA BANK
COMMERCE BANK, N.A.
COMMERCE BANK/NORTH, N.A.
COMMUNITY BANK OF BERGEN COUNTY
CORNERSTONE BANK
CREDIT UNION OF NEW JERSEY
CREST SAVINGS BANK, SLA
CROWN BANK
DELANCO FEDERAL SAVINGS BANK
ENTERPRISE NATIONAL BANK N.J.
FIRST BANKAMERICANO
FIRST CHOICE BANK
FIRST HOPE BANK, NA
FIRST NATIONAL BANK OF ABSECON
FIRST NATIONAL BANK OF ELMER (THE)
FIRST SAVINGS BANK OF NEW JERSEY, a Division of New York Community Bank
FIRST STATE BANK
FIRSTRUST BANK
FORT LEE FEDERAL SAVINGS BANK
FOX CHASE BANK
FRANKLIN SAVINGS BANK
FREEHOLD SAVINGS & LOAN
GARDEN STATE COMMUNITY BANK, a Division of New York Community Bank
GLEN ROCK SAVINGS BANK

GLOUCESTER COUNTY FEDERAL SAVINGS BANK
GRAND BANK, N.A.
GREATER ALLIANCE FEDERAL CREDIT UNION
GREATER COMMUNITY BANK
GSL SAVINGS BANK
HARVEST COMMUNITY BANK
HERITAGE COMMUNITY BANK
HIGHLANDS STATE BANK
HILLTOP COMMUNITY BANK
HOPEWELL VALLEY COMMUNITY BANK
HSBC BANK USA, N.A.
HUDSON CITY SAVINGS BANK
INDUS AMERICAN BANK
INVESTORS SAVINGS BANK
IRONBOUND BANK, a Division of New York Community Bank
ISN BANK (formerly interState Net Bank)
J.P. MORGAN CHASE BANK
KEARNY FEDERAL SAVINGS BANK
LAKELAND BANK
LIBERTY BELL BANK
LINCOLN PARK SAVINGS BANK
LLEWELLYN-EDISON SAVINGS BANK
MAGYAR BANK
MANASQUAN SAVINGS BANK
MARATHON BANK
MARINER'S BANK
MELLON BANK, N.A.
METUCHEN SAVINGS BANK
MILLINGTON SAVINGS BANK
MILLVILLE SAVINGS AND LOAN ASSOCIATION
MONROE SAVINGS BANK, SLA
NEW MILLENNIUM BANK
NEW YORK COMMUNITY BANK
NEWFIELD NATIONAL BANK
NJM BANK
NOBLE COMMUNITY BANK
NORTHERN STATE BANK
NORTH FORK BANK
NORTH JERSEY COMMUNITY BANK
NORTHFIELD BANK
NVE BANK
OCEAN CITY HOME BANK
OCEANFIRST BANK
ORITANI SAVINGS BANK
PAMRAPO SAVINGS BANK, SLA
PARKE BANK
PASCACK COMMUNITY BANK
PEAPACK-GLADSTONE BANK
PENN FEDERAL SAVINGS BANK, a Division of New York Community Bank
PENNSVILLE NATIONAL BANK
PENNSYLVANIA BUSINESS BANK (PBB)
PNC BANK, N.A.
PONCE DE LEON FEDERAL BANK
PROVIDENT BANK (THE)
REGAL BANK
REPUBLIC FIRST BANK
RSI BANK (formerly Rahway Savings Institution)
ROEBLING BANK
ROMA BANK
ROYAL BANK AMERICA
RUMSON-FAIR HAVEN BANK & TRUST COMPANY
SADDLE RIVER VALLEY BANK
SELECT BANK
SHORE COMMUNITY BANK
SKYLANDS COMMUNITY BANK
SOMERSET HILLS BANK
SOMERSET SAVINGS BANK, SLA
SOVEREIGN BANK
SPENCER SAVINGS BANK
STERLING BANK
STURDY SAVINGS BANK
SUMMIT FEDERAL SAVINGS BANK
SUN NATIONAL BANK
SUSQUEHANNA BANK, DV
SUSSEX BANK
SYNERGY BANK, a Division of New York Community Bank
TD BANKNORTH, N.A.
TEAM CAPITAL BANK
THE BANK
THIRD FEDERAL SAVINGS BANK
TOWN BANK (THE) formerly The Town Bank of Westfield
TOWNECENTER BANK, a division of Provident Bank, NY
TWO RIVER COMMUNITY BANK
UKRAINIAN NATIONAL FEDERAL CREDIT UNION
UNION CENTER NATIONAL BANK
UNION COUNTY SAVINGS BANK
UNITED STATES TRUST COMPANY OF NEW YORK
UNITY BANK
VALLEY NATIONAL BANK
WACHOVIA BANK, N.A.
WASHINGTON MUTUAL BANK
WAWEL SAVINGS BANK
WILSHIRE STATE BANK
WOORI AMERICA BANK

(Rev. 02/01/08)

APPENDIX H. CERTIFICATION RULE 1:39-6

1:39-6. Effect of Certification

(a) Not Exclusive. The standards and systems adopted herein shall in no way limit the right of a certified attorney to practice law in any respect nor shall any attorney-at-law of this State be barred from engaging in a designated area of practice by reason of lack of eligibility or certification.

(b) Use of Designation. An attorney who has satisfied the requirements of this rule and who has been certified may make dignified use of the area of practice designation as provided in the Regulations of the Board.

(c) Restrictions on Designation Use. No use may be made of the designations set forth in the Regulations of the Board except as therein provided, nor may other words or combination of words be used by a certified attorney in place of such designations.

(d) Division of Fees. A certified attorney who receives a case referral from a lawyer who is not a partner in or associate of that attorney's law firm or law office may divide a fee for legal services with the referring attorney or the referring attorney's estate. The fee division may be made without regard to services performed or responsibility assumed by the referring attorney, provided that the total fee charged the client relates only to the matter referred and does not exceed reasonable compensation for the legal services rendered therein. The provisions of this paragraph shall not apply to matrimonial law matters that are referred to certified attorneys.

(e) Obligation of Certified Attorneys. A certified attorney is under a continuing obligation, during the duration of the certification period, to notify the Board of any malpractice action brought, fee arbitrations filed, disciplinary complaints filed, or discipline imposed.

Note: Adopted January 26, 1979 as Rule 1:39-7 to be effective April 1, 1979; amended and redesignated Rule 1:39-6 May 15, 1980 to be effective September 8, 1980; amended December 13, 1983 to be effective January 3, 1984; paragraph (d) adopted November 1, 1985 to be effective January 2, 1986; paragraph (b) amended November 7, 1988 to be effective January 2, 1989; paragraph (d) amended July 13, 1994 to be effective September 1, 1994; paragraphs (a), (b), (c), and (d) amended June 28, 1996, to be effective September 1, 1996; corrective amendment adopted August 1, 1996 to be effective September 1, 1996; new paragraph (e) adopted July 5, 2000 to be effective September 5, 2000.

APPENDIX I. RULE OF PROFESSIONAL CONDUCT 1.5—FEES

RPC 1.5 Fees

(a) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services;

(8) whether the fee is fixed or contingent.

(b) When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated in writing to the client before or within a reasonable time after commencing the representation.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by law or by these rules. A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(d) A lawyer shall not enter into an arrangement for, charge, or collect:

(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof, or

(2) a contingent fee for representing a defendant in a criminal case.

(e) Except as otherwise provided by the Court Rules, a division of fee between lawyers who are not in the some firm may be made only if:

(1) the division is in proportion to the services performed by each lawyer, or, by written agreement with the client, each lawyer assumes joint responsibility for the representation; and

(2) the client is notified of the fee division; and

(3) the client consents to the participation of all the lawyers involved; and

(4) the total fee is reasonable.

Note: Adopted July 12, 1984 to be effective September 10, 1984; new subparagraph (3)(2) added and former subparagraph (e)(2) and (e)(3) redesignated as subparagraphs (e)(3) and (e)(4) November 17, 2003 and to be effective January 1, 2004.

APPENDIX J. SAMPLE RECORD KEEPING DOCUMENTS

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(2) Trust Disbursements Book 173

(3) Clients' Trust Ledger 174

(4) Trust Receipts/Disbursements Control Sheet 175

(5) Trust Reconciliation Sheet 176

(6) Business Receipts Book 177

(7) Business Disbursements Book 178

(8) Business Receipts/Disbursements Control Sheet 179

(9) Business Reconciliation Sheet 180

TRUST RECEIPTS BOOK

MONTH OF:_____ 20___

DATE	SOURCE	CLIENT	CASE NO. OR FILE NO.	AMOUNT	DEPOSIT

TRUST DISBURSEMENTS BOOK

MONTH OF:_____ 20___

DATE	CHECK NO.	PAYEE	PURPOSE	CLIENT	CASE NO. OR FILE NO.	AMOUNT

CLIENTS' TRUST LEDGER

NAME OF CLIENT _____ FILE OR CASE NUMBER _____

LEGAL MATTER OR ADVERSE PARTY _____

DATE	DESCRIPTION OF TRANSACTION	CHECK NO.	FUNDS PAID	FUNDS RECEIVED	BALANCE

TRUST ACCOUNT RECEIPTS/DISBURSEMENTS CONTROL SHEET

FOR 20__

MONTH	**TRUST FUNDS**		**BALANCE**
	RECEIVED	DISBURSED	
JANUARY			
FEBRUARY			
MARCH			
APRIL			
MAY			
JUNE			
JULY			
AUGUST			
SEPTEMBER			
OCTOBER			
NOVEMBER			
DECEMBER			
TOTALS			

TRUST RECONCILIATION SHEET

As of the month ended

_____ 20____

		BALANCE
Receipts/Disbursements Control Sheet Balance		$_____*
Clients' Trust Ledger Balances:		
NAME OF CLIENT	AMOUNT $_____	$_____
Attorney funds (Bank Charges)		
Total of all Clients' Trust Ledger Balances		$_____*
Trust Checkbook Balance (at end of month)		$_____*
Add: All Outstanding Checks	$_____	
Less: All Outstanding Deposits	$_____	
Trust Checkbook Reconciliation Balance		$_____**
Balance per monthly bank statement		$_____**
(at end of month)		_____

*These amounts must be identical to each other.
**These amounts must agree with each other.

BUSINESS RECEIPTS BOOK

MONTH OF:______________________

ATE	RECEIVED FROM	CLIENT OR FILE NO.	FEE INCOME			COSTS RECOVERED	OTHER RECEIPTS		TOTAL RECEIPTS	TOTAL DEPOSIT
			Trust Acct.	Other Billings	Misc.		Item	Amt.		

BUSINESS DISBURSEMENTS BOOK

MONTH OF:________

ATE	PAID TO	CHECK NO.	AMOUNT OF CHECK	COSTS ADVANCED		DRAWING ACCOUNT	SALARIES	TRAVEL	OTHER	
				Client	Amt.				Amt.	Item

BUSINESS ACCOUNT
RECEIPTS/DISBURSEMENTS CONTROL SHEET

FOR 20__

MONTH	**LEGAL FEES**		**BALANCE**
	RECEIVED	DISBURSED	
JANUARY			
FEBRUARY			
MARCH			
APRIL			
MAY			
JUNE			
JULY			
AUGUST			
SEPTEMBER			
OCTOBER			
NOVEMBER			
DECEMBER			
TOTALS			

BUSINESS RECONCILIATION SHEET

As of the month ended

_____ 20____

Receipts/Disbursements Control Sheet Balance		$_____*
Business Checkbook Balance		$_____*
Add: All Outstanding Checks	$_____	
Less: All Outstanding Deposits	$_____	
Business Checkbook Reconciliation Balance		$_____**
Bank Statement Balance		$_____**

*These amounts must be identical to each other.

**These amounts must agree with each other.

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