

Rule 1.15: Safekeeping Property

1. Current Kentucky Rule with Official Comments:

SCR 3.130(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 a lawyer=s own property. Funds shall be kept in a separate account maintained in the state where the lawyer=s office is situated, or elsewhere with the consent of the client or third person. The separate account referred to in the preceding sentence shall be maintained in a bank which has agreed to notify the Kentucky Bar Association in the event that any overdraft occurs in the account. 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 five years after termination of the representation.

(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 and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(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 may deposit funds in an account for the limited purpose of minimizing bank charges. A lawyer may also participate in an IOLTA program authorized by law or court rule.

Supreme Court Commentary

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

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

[2] Lawyers often receive funds from third parties from which the lawyer's fee will be paid. If there is risk that the client may divert the funds without paying the fee, the lawyer is not required to remit the portion from which the fee is to be paid. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds should be kept in trust and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds shall be promptly distributed.

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

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

[5] A "clients' security fund" provides a means through the collective efforts of the bar to reimburse persons who have lost money or property as a result of dishonest conduct of a lawyer. Where such a fund has been established, a lawyer should participate.

2. Proposed Kentucky Rule with Official Comments:

SCR 3.130(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 the state where the lawyer's office is situated, or elsewhere with the consent of the client, ~~or~~ third person, or both in

the event of claim by each to the property. 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 five years after termination of the representation.

(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,~~ or both in the event of claims by each to the property. Except as stated in this Rule or otherwise permitted by law or by agreement with the client, third person, or both in the event of a claim by each to the property, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(c) When in the course of representation a lawyer is in possession of property in which ~~both~~ two or more persons (one of whom may be 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.~~ The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

(d) A lawyer may deposit the lawyer's own funds in a client trust account for the sole purpose of paying bank service charges on that account, but only in an amount necessary for that purpose. ~~A lawyer may also participate in an IOLTA program authorized by law or court rule.~~

(e) A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred.

Supreme Court Commentary Comment

[1] A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property that is the

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

[2] Lawyers often receive funds from ~~third parties from~~ which the lawyer's fee will be paid. ~~If there is risk that the client may divert the funds without paying the fee, the~~ The lawyer is not required to remit the portion from which the fee is to be paid to the client funds that the lawyer reasonably believes represent fees owed. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds ~~should~~ must be kept in a trust account and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds shall be promptly distributed.

[3] Paragraph (c) describes the handling of disputes, including those between the lawyer and the client, the lawyer and third persons (or entities), and the client and third parties. Third Paragraph (c) recognizes that third parties, such as a client's creditors, may have just lawful claims against specific funds or other property in a lawyer's custody, such as a client's creditor who has a lien on funds recovered in a personal injury action. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client, and accordingly may. In such cases, when the third-party claim is not frivolous under applicable law, the lawyer must refuse to surrender the property to the client until the claims are resolved. However, a Generally, if the claim is based on a contract obligation, writing signed by the client, statutory lien, court order, legal obligation to ensure payment to a third party employed by the attorney to provide services in furtherance of the client's claim, or other law, the lawyer may not disburse the funds until the dispute is resolved. In these circumstances the client should also be advised of the risks of not paying a valid claim. A lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party, but, when there are substantial grounds for

dispute as to the person entitled to the funds, the lawyer may file an action to have a court resolve the dispute.

[4] While normally it is impermissible to commingle the lawyer's own funds with client funds, paragraph (d) provides that it is permissible when necessary to pay bank service charges on that account. Accurate records must be kept regarding which part of the funds are the lawyer's. A lawyer may deposit funds in a trust account to provide funds for restitution of the defalcation caused by others, if necessary under any legal obligation to a banking institution, client or third party whose funds have been converted.

[5] Paragraph (e) requires that when a lawyer has collected an advance deposit on a fee or for expenses or a flat fee for services not yet completed, the funds must be deposited in the trust account until earned, at which time they should be promptly distributed to the lawyer. At the termination of the client-lawyer relationship the lawyer must return any amount held that was not earned or was an unreasonable fee, as provided by Rules 1.5 and 1.16(d).

[4] [6] The obligations of a lawyer under this Rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves only as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction and is not governed by this Rule.

~~[5] A "clients' security fund" provides a means through the collective efforts of the bar to reimburse persons who have lost money or property as a result of dishonest conduct of a lawyer. Where such a fund has been established, a lawyer should participate.~~

3. Discussion and Explanation of Recommendation:

a. Comparison of proposed Kentucky Rule with its counterpart ABA Model Rule.

(1) The proposed KRPC 1.15 is consistent with MR 1.15 with these exceptions:

(a) Language has been added to paragraphs (a), (b), and (c) of the Rule clarifying responsibilities when there is a claim by both a client and third party for funds held by a lawyer.

(b) Language has been added to Comment [4] that allows a lawyer to deposit

funds for restitution for conversion of client funds caused by others.

(c) Committee drafted new Comment [5] is added to amplify paragraph (c) of the Rule concerning when funds must be deposited in a client trust account.

(d) Language has been added to Comment [3] that provides additional guidance for resolving third party claims against client funds.

(e) MR Comment [6] (*Ed. Note: This is Comment [5] in current KRPC 1.15.*) is deleted because its guidance on a client security fund is not applicable to Kentucky.

b. Detailed discussion of reason for variance from ABA Model Rule (if any).

The proposed KRPC 1.15 variances from MR 1.15 are for the purpose of clarifying and expanding guidance on lawyer duties in managing client funds. These additions were determined to be necessary based on bar disciplinary cases and the numerous questions lawyers have asked the Ethics Hotline about client trust account management and the claims of lien holders and the like. Additionally, the Committee retained the organization of the current KRPC 1.15 for continuity in citation of the Rule in CLE and disciplinary matters.

Committee proposal adopted without change. Order 2009-05, eff 7-15-09.