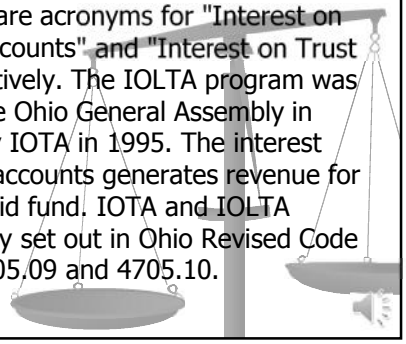
WHAT YOU SHOULD TO KNOW ABOUT THE IOLTA/IOTA ACCOUNT

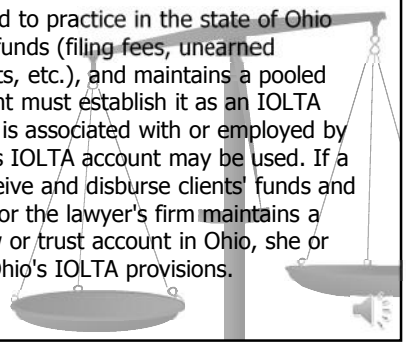
What is IOLTA/IOTA?

- IOLTA and IOTA are acronyms for "Interest on Lawyers' Trust Accounts" and "Interest on Trust Accounts" respectively. The IOLTA program was established by the Ohio General Assembly in 1985, followed by IOTA in 1995. The interest earned on these accounts generates revenue for the state's legal aid fund. IOTA and IOLTA provisions are fully set out in Ohio Revised Code 3953.231 and 4705.09 and 4705.10.



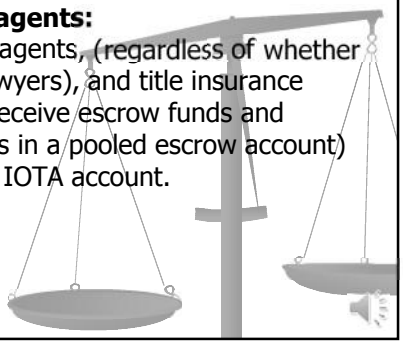
Who must have an IOLTA account?

- **Lawyers***:* Every lawyer licensed to practice in the state of Ohio who receives client funds (filing fees, unearned retainers, settlements, etc.), and maintains a pooled funds escrow account must establish it as an IOLTA account. If a lawyer is associated with or employed by a law firm, the firm's IOLTA account may be used. If a lawyer does not receive and disburse clients' funds and neither the lawyer nor the lawyer's firm maintains a pooled funds escrow or trust account in Ohio, she or he is exempt from Ohio's IOLTA provisions.



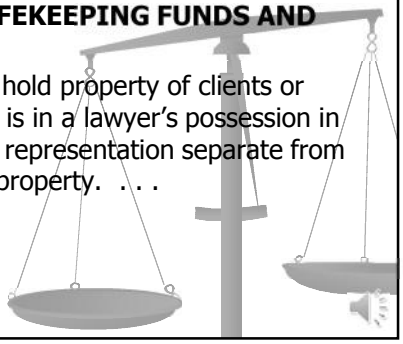
Who must have an IOTA account?

- **Title insurance agents:**
  All title insurance agents, (regardless of whether or not they are lawyers), and title insurance companies (that receive escrow funds and maintain the funds in a pooled escrow account) must establish an IOTA account.



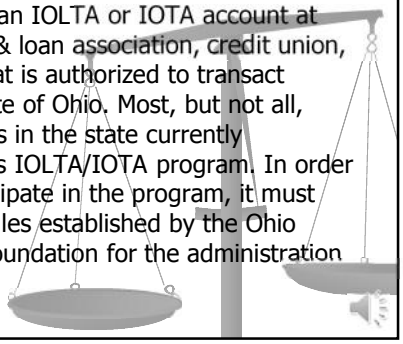
IOLTA Rules and the Rules of Professional Conduct

- **RULE 1.15: SAFEKEEPING FUNDS AND 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. . . .



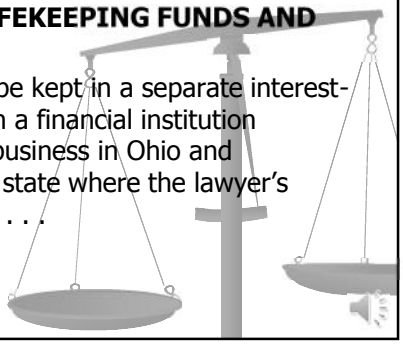
Where do I establish an IOLTA or IOTA account?

- You may establish an IOLTA or IOTA account at any bank, savings & loan association, credit union, or savings bank that is authorized to transact business in the state of Ohio. Most, but not all, financial institutions in the state currently participate in Ohio's IOLTA/IOTA program. In order for a bank to participate in the program, it must comply with the Rules established by the Ohio Legal Assistance Foundation for the administration of the program.



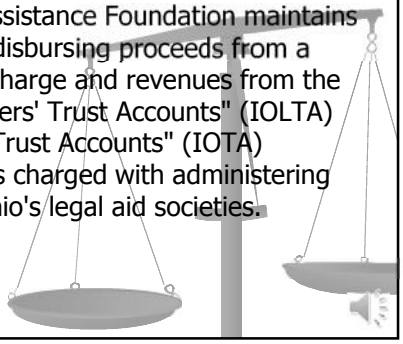
IOLTA Rules and the Rules of Professional Conduct

- **RULE 1.15: SAFEKEEPING FUNDS AND PROPERTY**
- . . . Funds shall be kept in a separate interest-bearing account in a financial institution authorized to do business in Ohio and maintained in the state where the lawyer's office is situated. . . .



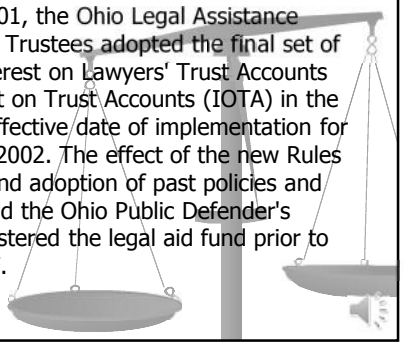
Who is OLAF and why do they govern my IOLTA/IOTA Account?

- The Ohio Legal Assistance Foundation maintains responsibility for disbursing proceeds from a civil filing fee surcharge and revenues from the "Interest on Lawyers' Trust Accounts" (IOLTA) and "Interest on Trust Accounts" (IOTA) programs. OLAF is charged with administering state funds for Ohio's legal aid societies.



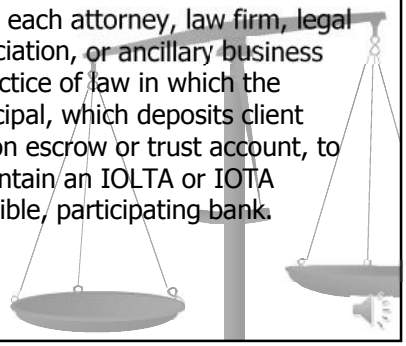
How does OLAF affect your IOLTA/IOTA accounts?

- On September 6, 2001, the Ohio Legal Assistance Foundation Board of Trustees adopted the final set of Rules governing Interest on Lawyers' Trust Accounts (IOLTA) and Interest on Trust Accounts (IOTA) in the state of Ohio. The effective date of implementation for the Rules is April 1, 2002. The effect of the new Rules is the modification and adoption of past policies and practices of OLAF and the Ohio Public Defender's Office, which administered the legal aid fund prior to the creation of OLAF.



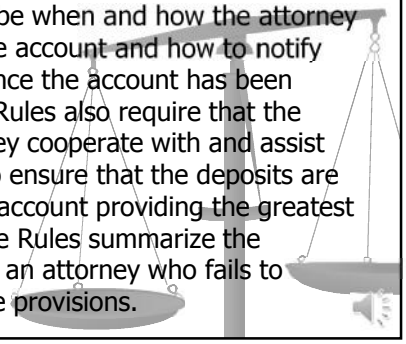
What are the OLAF Rules and what is their effect on me?

- The Rules require each attorney, law firm, legal professional association, or ancillary business related to the practice of law in which the attorney is a principal, which deposits client funds in a common escrow or trust account, to establish and maintain an IOLTA or IOTA account in an eligible, participating bank.



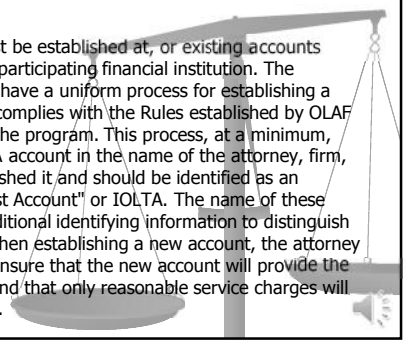
What are the OLAF Rules and what is their effect on me?

- The Rules prescribe when and how the attorney must establish the account and how to notify the Foundation once the account has been established. The Rules also require that the depositing attorney cooperate with and assist the Foundation to ensure that the deposits are maintained in an account providing the greatest return. Finally, the Rules summarize the consequences for an attorney who fails to comply with these provisions.



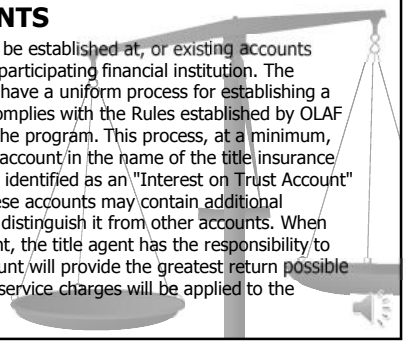
How do I establish an IOLTA Account?

- **FOR LAWYERS**
- New IOLTA accounts must be established at, or existing accounts converted to, an eligible, participating financial institution. The participating bank should have a uniform process for establishing a new IOLTA account that complies with the Rules established by OLAF for the administration of the program. This process, at a minimum, should establish an IOLTA account in the name of the attorney, firm, or association that established it and should be identified as an "Interest on Lawyers Trust Account" or IOLTA. The name of these accounts may contain additional identifying information to distinguish it from other accounts. When establishing a new account, the attorney has the responsibility to ensure that the new account will provide the greatest return possible and that only reasonable service charges will be applied to the account.



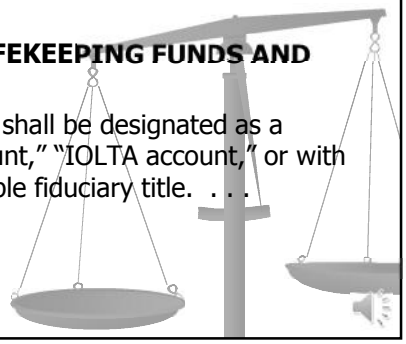
How do I establish an IOTA Account?

- **FOR TITLE AGENTS**
- New IOTA accounts must be established at, or existing accounts converted to, an eligible, participating financial institution. The participating bank should have a uniform process for establishing a new IOTA account that complies with the Rules established by OLAF for the administration of the program. This process, at a minimum, should establish an IOTA account in the name of the title insurance agent or company and be identified as an "Interest on Trust Account" or IOTA. The name of these accounts may contain additional identifying information to distinguish it from other accounts. When establishing a new account, the title agent has the responsibility to ensure that the new account will provide the greatest return possible and that only reasonable service charges will be applied to the account.



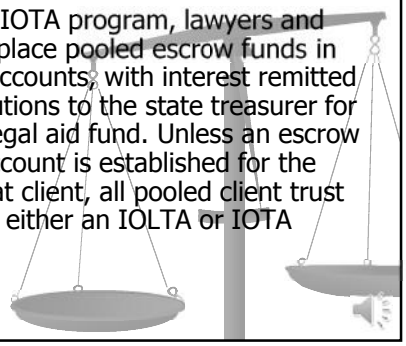
IOLTA Rules and the Rules of Professional Conduct

- **RULE 1.15: SAFEKEEPING FUNDS AND PROPERTY**
- . . . The account shall be designated as a "client trust account," "IOLTA account," or with a clearly identifiable fiduciary title. . . .



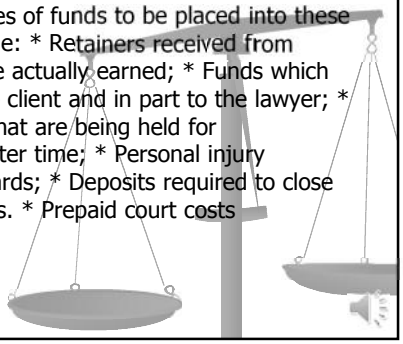
What does the IOLTA/IOTA program require you to do?

- Under the IOLTA/IOTA program, lawyers and title agents must place pooled escrow funds in interest-bearing accounts, with interest remitted by financial institutions to the state treasurer for deposit into the legal aid fund. Unless an escrow or client's trust account is established for the sole benefit of that client, all pooled client trust accounts must be either an IOLTA or IOTA account.



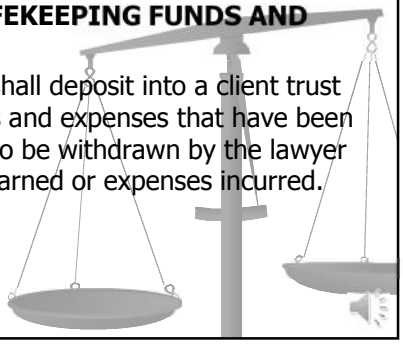
What types of client funds should go into an IOLTA /IOTA account?

- Examples of the types of funds to be placed into these trust accounts include: * Retainers received from clients, until they are actually earned; * Funds which belong in part to the client and in part to the lawyer; * Funds of the client that are being held for disbursement at a later time; * Personal injury settlements and awards; * Deposits required to close property transactions. * Prepaid court costs



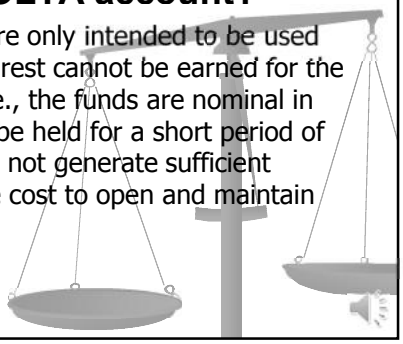
Prof.Cond.R. 1.15(C)

- **RULE 1.15: SAFEKEEPING FUNDS AND PROPERTY**
- . . . (c) 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.



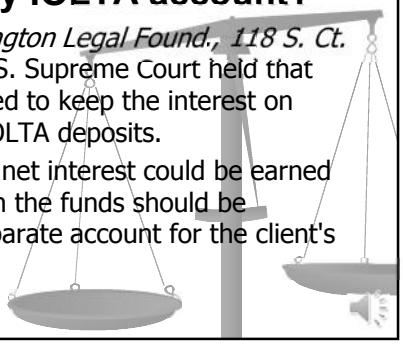
When should I place client funds in my IOLTA account?

- IOLTA accounts are only intended to be used whenever net interest cannot be earned for the client's benefit (i.e., the funds are nominal in amount or are to be held for a short period of time and thus can not generate sufficient interest above the cost to open and maintain the account).



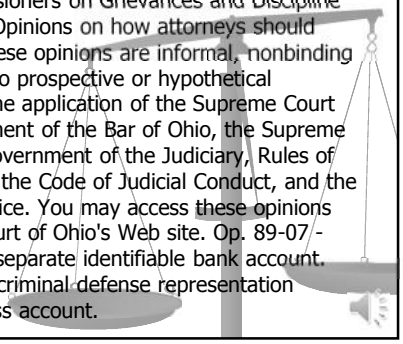
When should I *NOT* place client funds in my IOLTA account?

- *Phillips v. Washington Legal Found., 118 S. Ct. 1925 (1998)).* U.S. Supreme Court held that the client is entitled to keep the interest on large long term IOLTA deposits.
- Rule to follow: If net interest could be earned for the client, then the funds should be deposited in a separate account for the client's benefit.



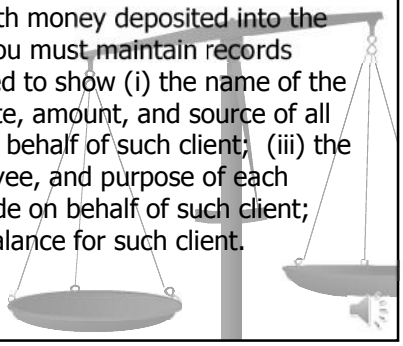
What about flat-fee agreements and retainer fee agreements?

- The Board of Commissioners on Grievances and Discipline has offered Advisory Opinions on how attorneys should handle these fees. These opinions are informal, nonbinding opinions in response to prospective or hypothetical questions regarding the application of the Supreme Court Rules for the Government of the Bar of Ohio, the Supreme Court Rules for the Government of the Judiciary, Rules of Professional Conduct, the Code of Judicial Conduct, and the Attorney's Oath of Office. You may access these opinions from the Supreme Court of Ohio's Web site. Op. 89-07 - deposit of retainer in separate identifiable bank account. Op. 96-4 - Flat fee in criminal defense representation deposited into business account.



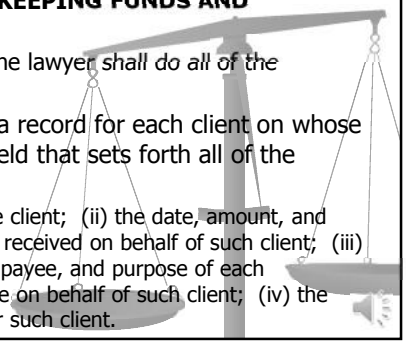
What Information do I maintain for Money in the IOLTA Account?

- For each client with money deposited into the IOLTA account, you must maintain records sufficiently detailed to show (i) the name of the client; (ii) the date, amount, and source of all funds received on behalf of such client; (iii) the date, amount, payee, and purpose of each disbursement made on behalf of such client; (iv) the current balance for such client.



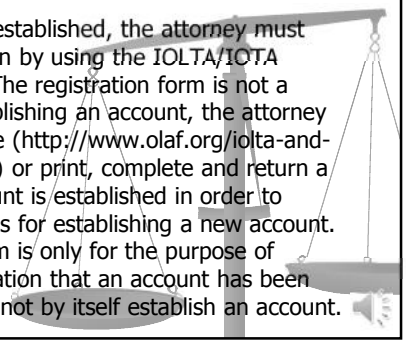
IOLTA Rules and the Rules of Professional Conduct

- **RULE 1.15: SAFEKEEPING FUNDS AND PROPERTY**
- (a) . . . For funds, the lawyer *shall do all of the* following:
- . . . (2) maintain a record for each client on whose behalf funds are held that sets forth all of the following:
  - (i) the name of the client; (ii) the date, amount, and source of all funds received on behalf of such client; (iii) the date, amount, payee, and purpose of each disbursement made on behalf of such client; (iv) the current balance for such client.



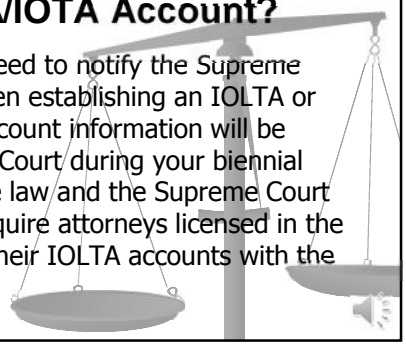
Must I notify OLAF to establish an IOLTA/IOTA Account?

- After an account is established, the attorney must notify the Foundation by using the IOLTA/IOTA Registration Form. The registration form is not a prerequisite to establishing an account, the attorney must register on-line (http://www.olaf.org/iolta-and-iota/register-online/) or print, complete and return a form once the account is established in order to complete the process for establishing a new account. The registration form is only for the purpose of notifying the Foundation that an account has been established. It does not by itself establish an account.



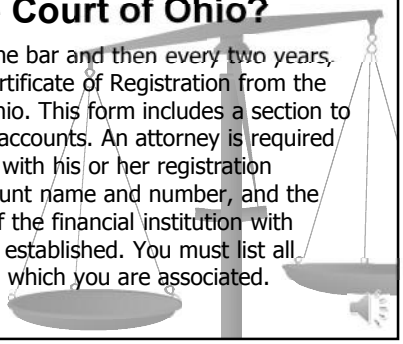
Do I also notify the Supreme Court of Ohio when establishing an IOLTA/IOTA Account?

- Lawyers do not need to notify the Supreme Court of Ohio when establishing an IOLTA or IOTA account. Account information will be requested by the Court during your biennial registration. State law and the Supreme Court of Ohio's rules require attorneys licensed in the state to register their IOLTA accounts with the Court.



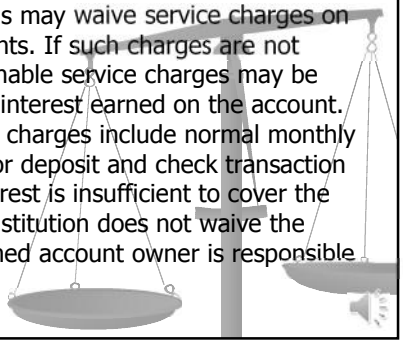
When and how is notification of a new account provided to the Supreme Court of Ohio?

- Upon admission to the bar and then every two years, you will receive a Certificate of Registration from the Supreme Court of Ohio. This form includes a section to register your IOLTA accounts. An attorney is required to provide the Court with his or her registration number, IOLTA account name and number, and the name and location of the financial institution with which the account is established. You must list all IOLTA accounts with which you are associated.



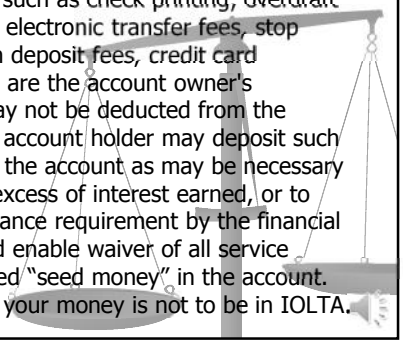
Who pays service charges on the IOLTA/IOTA account?

- Financial institutions may waive service charges on IOLTA/IOTA accounts. If such charges are not waived, only reasonable service charges may be deducted from the interest earned on the account. Reasonable service charges include normal monthly maintenance fees or deposit and check transaction charges. If the interest is insufficient to cover the charges, and the institution does not waive the difference, the named account owner is responsible for the balance.



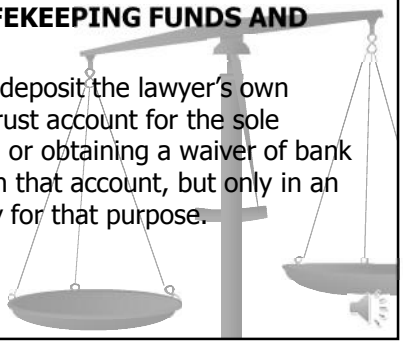
Who pays service charges on the IOLTA/IOTA account?

- Charges for services such as check printing, overdraft penalties/protection, electronic transfer fees, stop payment fees, return deposit fees, credit card brokerage fees, etc., are the account owner's responsibility and may not be deducted from the interest earned. The account holder may deposit such additional funds into the account as may be necessary to cover charges in excess of interest earned, or to meet a minimum balance requirement by the financial institution that would enable waiver of all service charges. This is called "seed money" in the account. But for seed money, your money is not to be in IOLTA.



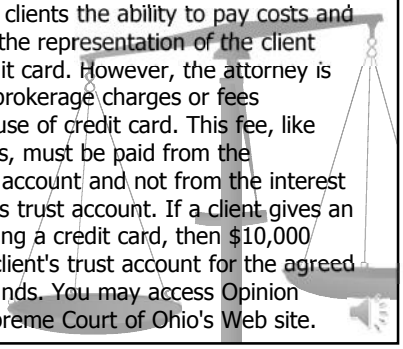
Prof.Cond.R. 1.15(b)

- **RULE 1.15: SAFEKEEPING FUNDS AND PROPERTY**
- (b) A lawyer may deposit the lawyer's own funds in a client trust account for the sole purpose of paying or obtaining a waiver of bank service charges on that account, but only in an amount necessary for that purpose.



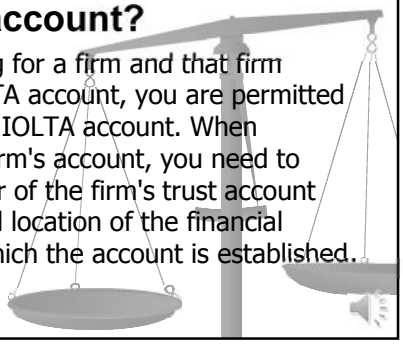
May I accept credit card payments from a client?

- Attorneys may allow clients the ability to pay costs and expenses related to the representation of the client with the client's credit card. However, the attorney is responsible for any brokerage charges or fees associated with the use of credit card. This fee, like other service charges, must be paid from the attorney's operating account and not from the interest earned on the client's trust account. If a client gives an attorney $10,000 using a credit card, then $10,000 must remain in the client's trust account for the agreed upon use of these funds. You may access Opinion 2007-3 from the Supreme Court of Ohio's Web site.



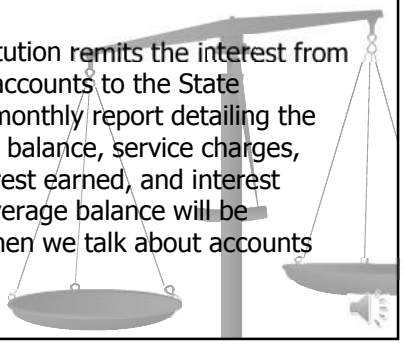
Is each attorney in a law firm required to have an IOLTA account?

- If you are working for a firm and that firm maintains an IOLTA account, you are permitted to use your firm's IOLTA account. When registering your firm's account, you need to obtain the number of the firm's trust account and the name and location of the financial institution with which the account is established.



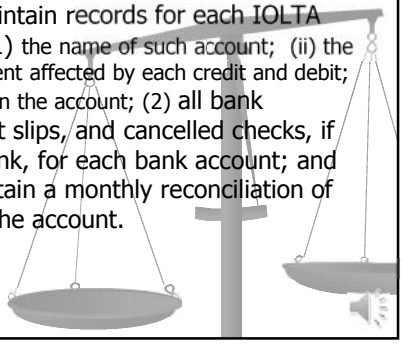
Who sends in the interest these accounts earn?

- The financial institution remits the interest from IOLTA and IOTA accounts to the State Treasurer with a monthly report detailing the account's average balance, service charges, interest rate, interest earned, and interest remitted. (The average balance will be important later when we talk about accounts that go negative.)



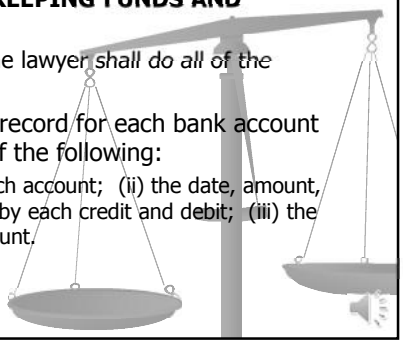
What are the recordkeeping rules for the IOLTA Account?

- Attorneys must maintain records for each IOLTA account showing (1) the name of such account; (ii) the date, amount, and client affected by each credit and debit; and (iii) the balance in the account; (2) all bank statements, deposit slips, and cancelled checks, if provided by the bank, for each bank account; and (3) perform and retain a monthly reconciliation of all transactions in the account.



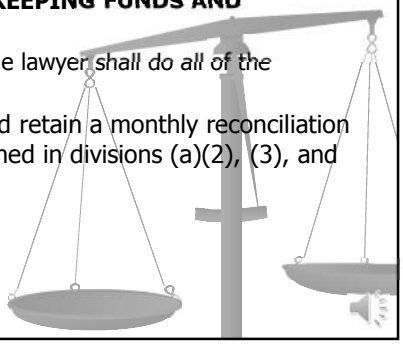
IOLTA Rules and the Rules of Professional Conduct

- **RULE 1.15: SAFEKEEPING FUNDS AND PROPERTY**
- (a) . . . For funds, the lawyer *shall do all of the* following:
- . . . (3) maintain a record for each bank account that sets forth all of the following:
  - (i) the name of such account; (ii) the date, amount, and client affected by each credit and debit; (iii) the balance in the account.



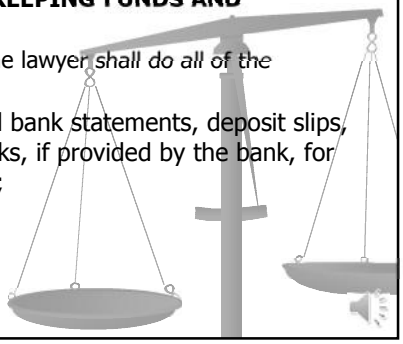
IOLTA Rules and the Rules of Professional Conduct

- **RULE 1.15: SAFEKEEPING FUNDS AND PROPERTY**
- (a) . . . For funds, the lawyer *shall do all of the* following:
- . . . (5) perform and retain a monthly reconciliation of the items contained in divisions (a)(2), (3), and (4) of this rule.



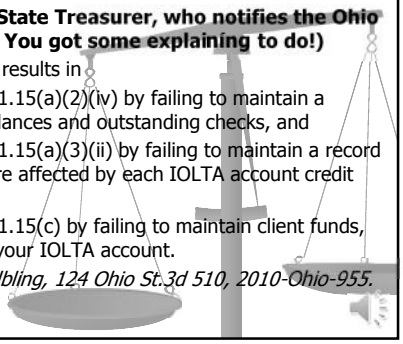
IOLTA Rules and the Rules of Professional Conduct

- **RULE 1.15: SAFEKEEPING FUNDS AND PROPERTY**
- (a) . . . For funds, the lawyer *shall do all of the* following:
- . . . (4) maintain all bank statements, deposit slips, and cancelled checks, if provided by the bank, for each bank account;



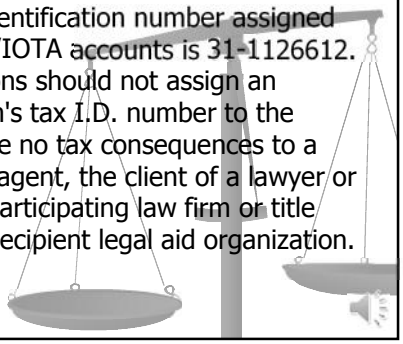
What if my IOLTA Account Balance Goes Negative?

- **Your bank notifies the State Treasurer, who notifies the Ohio Supreme Court. (Lucy! You got some explaining to do!)**
- A negative IOLTA balance results in
- (1) violating Prof.Cond.R. 1.15(a)(2)(iv) by failing to maintain a record of client current balances and outstanding checks, and
- (2) violating Prof.Cond.R. 1.15(a)(3)(ii) by failing to maintain a record of which client's funds were affected by each IOLTA account credit and debit, and
- (3) violating Prof.Cond.R. 1.15(c) by failing to maintain client funds, advanced by the client in your IOLTA account.
- *Cincinnati Bar Assn. v. Helbling, 124 Ohio St.3d 510, 2010-Ohio-955.*



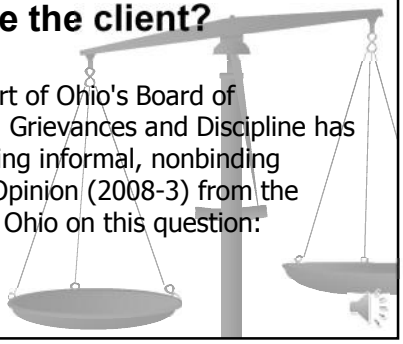
Whose tax identification number should be used?

- The federal tax identification number assigned to all Ohio IOLTA/IOTA accounts is 31-1126612. Financial institutions should not assign an individual's or firm's tax I.D. number to the account. There are no tax consequences to a lawyer or escrow agent, the client of a lawyer or escrow agent, a participating law firm or title company, or the recipient legal aid organization.



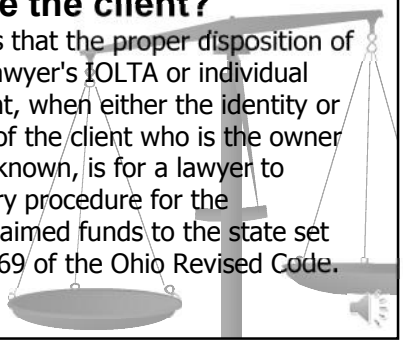
What do I do with client funds in my IOLTA when I am unable to locate the client?

- The Supreme Court of Ohio's Board of Commissioners on Grievances and Discipline has offered the following informal, nonbinding opinion Advisory Opinion (2008-3) from the Supreme Court of Ohio on this question:



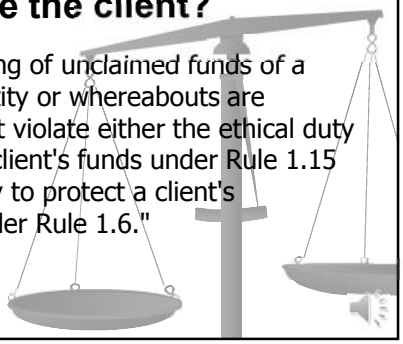
What do I do with client funds in my IOLTA when I am unable to locate the client?

- The Board advises that the proper disposition of client funds in a lawyer's IOLTA or individual client trust account, when either the identity or the whereabouts of the client who is the owner of the funds is unknown, is for a lawyer to follow the statutory procedure for the disposition of unclaimed funds to the state set forth in Chapter 169 of the Ohio Revised Code.



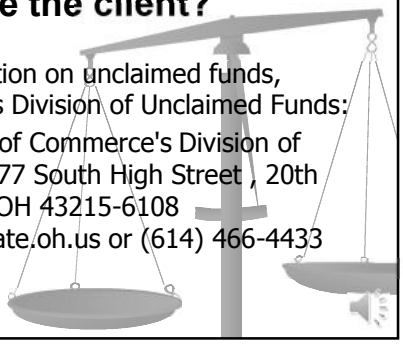
What do I do with client funds in my IOLTA when I am unable to locate the client?

- A lawyer's reporting of unclaimed funds of a client whose identity or whereabouts are unknown does not violate either the ethical duty of safekeeping a client's funds under Rule 1.15 or the ethical duty to protect a client's confidentiality under Rule 1.6."



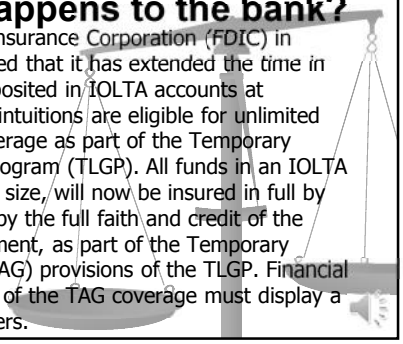
What do I do with client funds in my IOLTA when I am unable to locate the client?

- For more information on unclaimed funds, contact the state's Division of Unclaimed Funds:
- Ohio Department of Commerce's Division of Unclaimed Funds 77 South High Street , 20th Floor Columbus , OH 43215-6108 webunfd@com.state.oh.us or (614) 466-4433



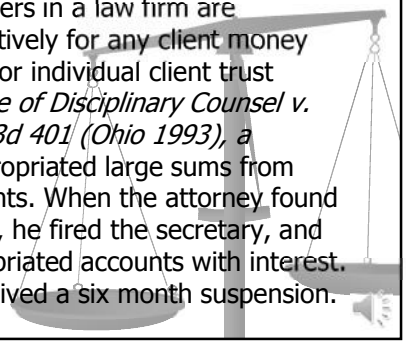
Are the funds in my IOLTA or IOTA insured from loss if something happens to the bank?

- The Federal Deposit Insurance Corporation (FDIC) in August 2009 announced that it has extended the time in which client funds deposited in IOLTA accounts at participating financial intuitions are eligible for unlimited deposit insurance coverage as part of the Temporary Liquidity Guarantee Program (TLGP). All funds in an IOLTA account, regardless of size, will now be insured in full by the FDIC and backed by the full faith and credit of the United States Government, as part of the Temporary Account Guarantee (TAG) provisions of the TLGP. Financial institutions opting out of the TAG coverage must display a notification to customers.



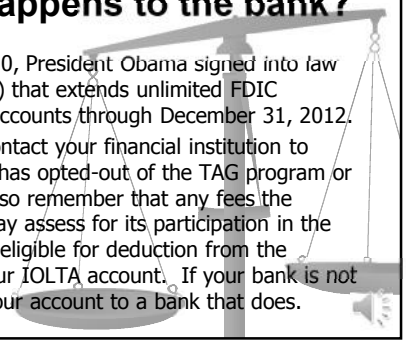
Who is responsible for IOLTA Funds that are stolen or lost?

- YOU and all partners in a law firm are responsible collectively for any client money kept in an IOLTA or individual client trust account. In *Office of Disciplinary Counsel v. Ball, 67 Ohio St. 3d 401 (Ohio 1993), a* secretary misappropriated large sums from client trust accounts. When the attorney found the delinquencies, he fired the secretary, and paid all misappropriated accounts with interest. The attorney received a six month suspension.



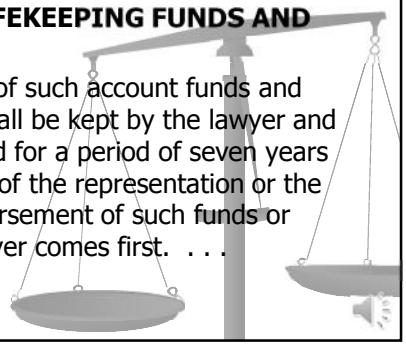
Are the funds in my IOLTA or IOTA insured from loss if something happens to the bank?

- On December 29, 2010, President Obama signed into law legislation (H.R. 6398) that extends unlimited FDIC insurance for IOLTA accounts through December 31, 2012.
- I encourage you to contact your financial institution to determine whether it has opted-out of the TAG program or if it is participating. Also remember that any fees the financial institution may assess for its participation in the TAG program are not eligible for deduction from the interest earned on your IOLTA account. If your bank is *not* participating, move your account to a bank that does.



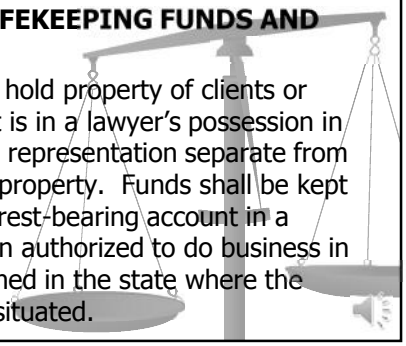
How Long must I keep IOLTA Records?

- **RULE 1.15: SAFEKEEPING FUNDS AND PROPERTY**
- (a) . . . 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 termination of the representation or the appropriate disbursement of such funds or property, whichever comes first. . . .



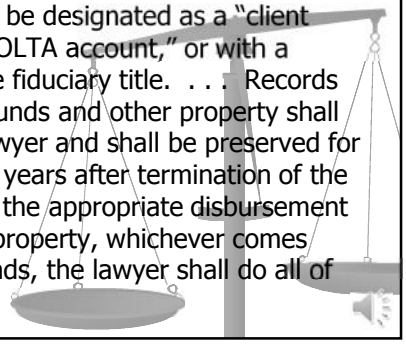
IOLTA Rules and the Rules of Professional Conduct

- **RULE 1.15: SAFEKEEPING FUNDS AND 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 interest-bearing account in a financial institution authorized to do business in Ohio and maintained in the state where the lawyer's office is situated.



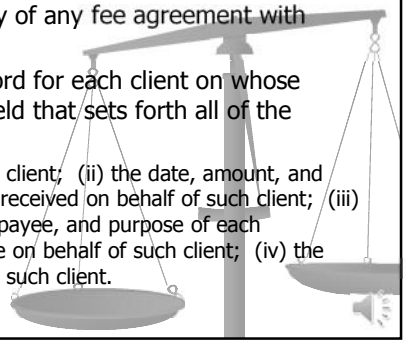
IOLTA Rules and the Rules of Professional Conduct (Continued)

- The account shall be designated as a "client trust account," "IOLTA account," or with a clearly identifiable fiduciary title. . . . 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 termination of the representation or the appropriate disbursement of such funds or property, whichever comes first. . . . For funds, the lawyer shall do all of the following:



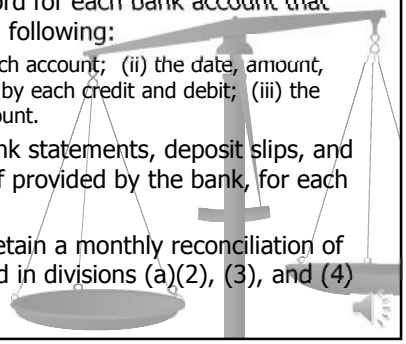
IOLTA Rules and the Rules of Professional Conduct (Continued)

- (1) maintain a copy of any fee agreement with each client;
- (2) maintain a record for each client on whose behalf funds are held that sets forth all of the following:
  - (i) the name of the client; (ii) the date, amount, and source of all funds received on behalf of such client; (iii) the date, amount, payee, and purpose of each disbursement made on behalf of such client; (iv) the current balance for such client.



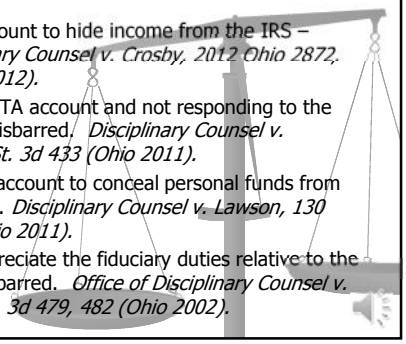
IOLTA Rules and the Rules of Professional Conduct (Continued)

- (3) maintain a record for each bank account that sets forth all of the following:
  - (i) the name of such account; (ii) the date, amount, and client affected by each credit and debit; (iii) the balance in the account.
- (4) maintain all bank statements, deposit slips, and cancelled checks, if provided by the bank, for each bank account;
- (5) perform and retain a monthly reconciliation of the items contained in divisions (a)(2), (3), and (4) of this rule.



FINAL THOUGHTS

- The fastest road to disbarment is through the IOLTA Account.
  - Using the IOLTA account to hide income from the IRS – disbarred. *Disciplinary Counsel v. Crosby, 2012 Ohio 2872. P5 (Ohio June 27, 2012).*
  - Overdrafting the IOLTA account and not responding to the "Certified Letter" – disbarred. *Disciplinary Counsel v. Nittskoff, 130 Ohio St. 3d 433 (Ohio 2011).*
  - Misusing the IOLTA account to conceal personal funds from creditors – disbarred. *Disciplinary Counsel v. Lawson, 130 Ohio St. 3d 184 (Ohio 2011).*
  - Total inability to appreciate the fiduciary duties relative to the IOLTA account – disbarred. *Office of Disciplinary Counsel v. Connors, 97 Ohio St. 3d 479, 482 (Ohio 2002).*



I hope you enjoyed the CLE.

Please check out the other available online CLEs from Legal Technicality, LLC at their website, WWW.LegalTechnicality.com.

If you have questions, contact:

John H. Phillips
Phillips Law Firm, Inc.
9521 Montgomery Road
Cincinnati, OH 45242
(513) 985-2500
FAX (513) 985-2503
Email: JHP@PhillipsLawFirm.com

The Supreme Court of Ohio

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

41 SOUTH HIGH STREET-SUITE 3370, COLUMBUS, OH 43215-6105
(614) 644-5800 FAX: (614) 644-5804

OFFICE OF SECRETARY

OPINION 89-07

Issued April 14, 1989

[CPR Opinion-provides advice under the Ohio Code of Professional Responsibility which is superseded by the Ohio Rules of Professional Conduct, eff. 2/1/2007.]

SYLLABUS: Pursuant to DR 9-102, all funds of clients paid to a lawyer or law firm, other than advances for costs and expenses, shall be deposited in one or more identifiable bank accounts maintained in the state in which the law office is situated and no funds belonging to the lawyer or law firm shall be deposited therein. Funds belonging in part to a client and in part presently or potentially to the lawyer or law firm 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.

OPINION: We have before us your request for an advisory opinion on whether you may establish interest-bearing accounts for retainer fees paid by individual clients and use the interest to supplement the retainer.

Under DR 9-102(A), all funds of clients paid to a lawyer shall be kept in one or more separate bank accounts and no funds belonging to the lawyer shall be kept in those accounts. Funds belonging in part to the client, and in part presently or potentially to the lawyer, must also be deposited in a separate, identifiable bank account. Code of Professional Responsibility, DR 9-102 (A)(2).

In 1985, the State Legislature passed Ohio Rev. Code §4705.09 which deals with the interest on the trust accounts that lawyers maintain for their clients. While we will not engage in statutory interpretation, we urge you to become familiar with the requirements under that statute.

In your request letter you inquire whether it would be permissible for you to keep a retainer from a client in an interest-bearing trust account for the duration of the representation. You would continue to bill your client monthly and expect payment in a timely manner. At the conclusion of the particular representation, the retainer would be applied against any unpaid fees. The balance, including earned interest, would then be returned to the client.

The type of situation you propose is controlled by DR 9-102 (A) (2). In our view, the money advanced by the client would belong in part to the client and in part to you. Therefore, you must deposit those funds in a separate, identifiable bank account. The disposition of the interest from such an account is controlled by Ohio Rev. Code §4705.09.

This is an informal, non-binding advisory opinion based upon the questions presented and limited to questions arising under the Code of Professional Responsibility.

The Supreme Court of Ohio

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

41 SOUTH HIGH STREET-SUITE 3370, COLUMBUS, OH 43215-6105
(614) 644-5800 FAX: (614) 644-5804

OFFICE OF SECRETARY

OPINION 96-4

Issued June 14, 1996

[CPR Opinion-provides advice under the Ohio Code of Professional Responsibility which is superseded by the Ohio Rules of Professional Conduct, eff. 2/1/2007.]

SYLLABUS: It is proper for a lawyer to enter a flat fee agreement requiring a criminal defendant to pay a fixed amount in advance of representation in a criminal matter. The flat fee agreement must comport with the Ohio Code of Professional Responsibility. Under DR 2-106(A), the flat fee must not be excessive. Under DR 5-103(B), the client must remain ultimately liable for expenses of litigation. Under DR 6-101 and DR 7-101, the flat fee agreement must not interfere with an attorney's duties of competent and zealous representation to each client. Under DR 9-102, a flat fee paid in advance of representation may be deposited into the lawyer's business account upon receipt pursuant to the agreement between the lawyer and client that the flat fee will be paid in advance of the representation. Under DR 2-106(A) and DR 2-110(A)(3), a flat fee paid in advance of representation in a legal matter should not be deemed nonrefundable.

OPINION: This opinion addresses a flat fee agreement requiring a client's payment of a fixed amount in advance of representation in a criminal matter. It does not address payment of a retainer to an attorney to secure availability of the lawyer's services over a period of time without regard to a specific matter.

> Is it proper for a lawyer to enter a flat fee agreement requiring a criminal defendant to pay a fixed amount in advance of representation in a criminal matter?

Fee agreements must comply with DR 2-106 of the Ohio Code of Professional Responsibility.

DR 2-106. Fees for Legal Services

(A) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee.

(B) A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides 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 limitation 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.

(C) A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee for representing a defendant in a criminal case.

Fixed fees are expressly recognized as a type of legal fee in DR 2-106(B)(8). Fixed fee agreements are required in criminal representations, since contingent fees in criminal cases are prohibited under DR 2-106(C).

A flat fee is a type of fixed fee. Flat fees are based upon factors independent of the actual number of hours involved in a representation. Flat fees provide certainty to clients with regard to costs of legal services while allowing attorneys to be paid a fair sum for their services. Flat fees are used for routine and standardized services, but are increasingly being used in representations that present uncertainties about the amount of time the lawyer will expend. *See* ABA/BNA Lawyer's Manual on Professional Conduct, 41:306 (2/23/94).

Criminal matters do present uncertainty with regard to the amount of time that may be expended, since the matters may be resolved through dismissal, plea agreement, or trial. However, time is but one factor to consider when determining the reasonableness of a fee under DR 2-106(B) . *See e.g.*, ABA, Informal Op. 1389 (1977) permitting the use of a fixed fee in advance for legal work on tax matters or litigation before the Tax Court when the fixed fee embraces all work to be done, whether it be relatively simple and of short duration, or complex and protracted.

This Board has addressed the use of flat fees, but in the context of a flat fee agreement between a law firm and an insurer/third party administrator of group health benefit plans. In Opinion 95-2 (1995), the Board advised that the propriety of a flat fee agreement is based upon a variety of factors. A fixed flat fee is subject to the restriction in DR 2-106(A) that it not be excessive. A fixed flat fee cannot circumvent the requirement of DR 5-103(B) that clients must remain liable for expenses of litigation. A fixed flat fee agreement must not limit an attorney's duties of competent and zealous representation to each client under DR 6-101 and DR 7-101. *See* Ohio SupCt, Bd of Comm'rs on Grievances and Discipline, Op. 95-2 (1995).

When the payment of a flat fee is in advance of representation, there are additional ethical considerations. Should a flat fee be place into the attorney's business account or should it be deposited into a client trust account? May the fee be nonrefundable?

DR 9-102(A) requires that the identity of all client funds paid to a lawyer or a law firm be preserved by deposit into an identifiable bank account,

separate from an account for deposits of the lawyer's or law firm's funds. Funds belonging in part to a client and in part presently or potentially to a lawyer or law firm must be deposited therein as required under DR 9-102(A)(2). These restraints are for the protection of clients.

> DR 9-102. PRESERVING IDENTITY OF FUNDS AND PROPERTY OF CLIENT
>
> (A) All funds of clients paid to a lawyer or law firm, other than advances for costs and expenses, shall be deposited in one or more identifiable bank accounts maintained in the state in which the law office is situated 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 and in part presently or potentially to the lawyer or law firm 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.

In this Board's view, DR 9-102(A) does not require that flat fees paid in advance for representation in a criminal matter be placed in a trust account. A flat fee for representation in a matter may be placed into the attorney's business account upon receipt, based upon the agreement between the lawyer and client that the flat fee will be paid in advance of representation. By agreement, the funds are given to the lawyer in exchange for the promise to represent the client in the matter. However, deposit into a business account does not mean that the fee is nonrefundable.

A flat fee paid in advance for representation in a legal matter should not be deemed nonrefundable. Nonrefundable fees paid in advance of representation allow attorneys to keep unearned fees for which a client receives little or no benefit. Nonrefundable advance fees are a problem when there is discharge of a lawyer by a client or when a lawyer withdraws from a case . *See* Cincinnati Bar Ass'n v. Schultz, 71 Ohio St. 3d 383, 384 (1994).

Ethics committees in Ohio disapprove of nonrefundable fee agreements. *See* Ohio State Bar Ass'n, Informal Op. 90-8 (1990); Columbus Bar Ass'n, Op. 5 (1988); Bar Ass'n of Greater Cleveland, Op. 84-1 (1984). *But cf*. Toledo Bar Ass'n, Op. 93-8 (1993) advising that nonrefundability is improper or proper depending upon the fact situation.

Ethics committees in other states have found disfavor with nonrefundable fee contracts in criminal defense representations. *See* Kansas Bar Ass'n, Op. 84-12 (1984), North Carolina State Bar Ass'n, Op. 106 (1991), Virginia State Bar, Op. 646 (1985). In New York, the state's highest court has held that nonrefundable retainers clash with public policy and contravene the Code of Professional Responsibility. *See* In re Cooperman, 83 N.Y. 2d 465, 633 N. E. 2d 1069, 611 N.Y.S. 2d 465 (1994), aff'g 591 N.Y.S. 2d 855 (A.D. 2 Dept. 1993). Among the bar, the issue of nonrefundability attracts attention. *See* Lester Brickman & Lawrence A. Cunningham, Nonrefundable Retainers: A Response to Critics of the Absolute Ban, 64 U. Cin. L. Rev. 11 (Fall 1995); Steven Lubet, The Rush to Remedies: Some Conceptual Questions About Nonrefundable Retainers, 73 N.C.L. Rev. 271 (Nov. 1994); Lester Brickman & Lawrence A. Cunningham, Nonrefundable Retainers Revisited, 72 N.C.L. Rev. 1 (Nov. 1993).

Nonrefundable advance fees contradict the requirement of DR 2-110(A)(3) that "[a] lawyer who withdraws from employment shall refund promptly any part of a fee paid in advance that has not been earned." A nonrefundable advance fee agreement unfairly penalizes a client who discharges a lawyer.

In conclusion, it is proper for a lawyer to enter a flat fee agreement requiring a criminal defendant to pay a fixed amount in advance of representation in a criminal matter. The flat fee agreement must comport with the Ohio Code

of Professional Responsibility. Under DR 2-106(A), the flat fee must not be excessive. Under DR 5-103(B), the client must remain ultimately liable for expenses of litigation. Under DR 6-101 and DR 7-101, the flat fee agreement must not interfere with an attorney's duties of competent and zealous representation to each client. Under DR 9-102, a flat fee paid in advance of representation may be deposited into the lawyer's business account upon receipt pursuant to the agreement between the lawyer and client that the flat fee will be paid in advance of the representation. Under DR 2-106(A) and DR 2-110(A)(3), a flat fee paid in advance of representation in a legal matter should not be deemed nonrefundable.

The Supreme Court of Ohio

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

65 SOUTH FRONT STREET, 5TH FLOOR, COLUMBUS, OH 43215-3431
(614) 387-9370 (888) 664-8345 FAX: (614) 387-9379
www.sconet.state.oh.us

OFFICE OF SECRETARY

OPINION 2007-3
Issued April 13, 2007

SYLLABUS: A lawyer may accept credit card payments from clients for earned legal fees, reimbursement of legal expenses, advances on unearned legal fees, and advances on future expenses. Credit card payments for earned fees and reimbursement of legal expenses belong in a business account, whereas, credit card payments for advances on unearned legal fees and advances on future legal expenses must go into a client trust account. Preferably, a lawyer would maintain two credit card merchant accounts, one used for credit card payments to a business account and one for credit card payments to a client trust account. But, because two merchant accounts may not be feasible or practical, it is acceptable for a lawyer to maintain one merchant account with the credit card payments all going into a client trust account, provided that the credit card payments for earned legal fees and reimbursements of expenses are promptly transferred from the trust account to a business account.

A lawyer may place his or her own funds into a client trust account to pay brokerage and credit card service charges. Credit card service charges are the responsibility of the lawyer and may not be deducted from the interest earned on a client trust account.

OPINION: This opinion addresses questions regarding credit card payments by clients.

1. May a lawyer accept credit card payments from clients for earned legal fees, for reimbursement of expenses, for advances on unearned legal fees, and for advances on future expenses, and, should these credit card payments go into a client trust account or a business account?

2. May a lawyer deposit his or her own funds into a client trust account to pay the service fee charged by a credit card company on a client's credit card transaction?

Question 1

The Ohio Rules of Professional Conduct do not prohibit a lawyer from accepting credit card payments from clients. But, like any other method of payment, a lawyer must handle the funds in a manner consistent with Rule 1.15 of the Ohio Rules of Professional Conduct.

Rule 1.15 governs the safekeeping of funds and property. Comment [1] to Rule 1.15 explains "[a] lawyer should hold property of others with the care required of a professional fiduciary."

Lawyers should thoroughly familiarize themselves with all the requirements of Rule 1.15. For example, Rule 1.15(a) establishes detailed requirements for holding funds of clients (or third persons) in a separate interest-bearing account in a financial institution. The rule requires, inter alia, that "[t]he account shall be designated as a 'client trust account,' 'IOLTA account,' or with a clearly identifiable fiduciary title," that certain records be kept, and that records be preserved for a period of seven years after termination of the representation or the appropriate disbursement of such funds, whichever comes first.

But, most pertinent to this opinion is the first sentence of Rule 1.15(a) and Rule 1.15(c) in its entirety.

> Rule 1.15(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.
>
> Rule 1.15(c) A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance [by the client], to be withdrawn by the lawyer only as fees are earned or expenses incurred.

Pursuant to Rule 1.15(a), payments from a client for earned legal fees and for reimbursement of expenses advanced by the lawyer go into a lawyer's business account.

Pursuant to Rule 1.15(c), payments from a client made as advances on unearned legal fees and as advances on future expenses go into a client trust account.

The question arises how a lawyer who has only one merchant account for credit card payments may properly accept credit card payments for some funds that belong in a client trust account and some funds that belong in a business account.

The ideal solution would be for the lawyer to establish two merchant accounts for credit card payments, one crediting payments to a client trust account and one crediting payments to a business account. But, this may not be practicable or feasible.

There is an alternate solution. If a lawyer wants to accept all types of payments (for earned and unearned fees as well as for expense reimbursement and future expenses) and it is not practicable or feasible for lawyer to set up two merchant accounts, one where the credit card payment would go into a client trust account and one where the payment would go into a lawyer's business account, the lawyer should set up a single merchant account as a client trust account. Under this alternate solution, all credit card payments would go into a client trust account, but the earned fees and reimbursement for expenses would be withdrawn from the trust account promptly and placed into the business account. This is the approach taken by several states. See Kansas Bar Assn, Op. 01-2 (2001), Maryland State Bar Assn, Op. 03-06 (2003), Missouri SupCt., Advisory Comm. Informal Op. 20000202 (9/00-10/00), North Carolina State Bar, Op. RPC 247 (1997), Oregon State Bar, Formal Op. 2005-172 (2005).

In this Board's view, this is an acceptable approach because the lawyer's fiduciary duties are fulfilled. All the credit card payments would go into the client trust account, bout the earned fees and reimbursement for expenses would be withdrawn promptly from the trust account and placed into the business account. This arrangement honors the strict requirement of Rule 1.15(c) that legal fees and expenses that have been paid in advance go into a client trust account, and accommodates Rule 1.15(a) by the prompt transfer of the earned fees and expense reimbursement into the business account.

In conclusion to Question 1, the Board advises as follows. A lawyer may accept credit card payments from clients for earned legal fees, reimbursement of legal expenses, advances on unearned legal fees, and advances on future expenses. Credit card payments for earned fees and reimbursement of legal expenses belong in a business account, whereas, credit card payments for advances on unearned legal fees and advances on future legal expenses must go into a client trust account. Preferably, a lawyer would maintain two credit card merchant accounts, one used for credit card payments to a business account and one for credit card payments to a client trust account. But, because two merchant accounts may not be feasible or practical, it is acceptable for a lawyer to maintain one merchant account with the credit card payments all going into a client trust account, provided that the credit card payments for earned legal fees and reimbursements of expenses are promptly transferred from the trust account to a business account.

Question 2

Rule 1.15(b) states: "A lawyer may deposit the lawyer's own funds in a client trust account for the sole purpose of paying or obtaining a waiver of bank service charges on that account, but only in an amount necessary for that purpose."

Comment [2] to Rule 1.15 explains that it is proper for a lawyer's own funds to be placed into a client trust account to pay brokerage and credit card service charges.

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

In application, a lawyer is responsible for the credit card fees incurred from a client's payment by credit card. Unlike some service charges (such as normal monthly maintenance fees or deposit and check transaction charges) that may be waived by the bank or that may be deducted from the interest earned on an IOLTA account, a charge or fee associated with the use of a credit card may not be deducted from the interest.

For related guidance see rules promulgated by the Ohio Legal Assistance Foundation pursuant to R.C. 120.52, in particular, Rule 120.51-1-03(R), Rule 120.51-2-01(C)(2), and Rule 120.51-2-02(C). See also, www.olaf.org (last visited 2.7.2007) under Frequently Asked Questions. "May I use a credit card to accept payment from a client?" and "What about service charges?" (stating that credit card brokerage fees are the account owner's responsibility and may not be deducted from the interest earned).

In answer to Question 2, the Board advises as follows. A lawyer may place his or her own funds into a client trust account to pay brokerage and credit card service charges. Credit card service charges are the responsibility of the lawyer and may not be deducted from the interest earned on a client trust account.

Advisory Opinions of the Board of Commissioners on Grievances and Discipline are informal, nonbinding opinions in response to prospective or hypothetical questions regarding the application of the Supreme Court Rules for the Government of the Bar of Ohio, the Supreme Court Rules for the Government of the Judiciary, the Ohio Rules of Professional Conduct, the Ohio Code of Judicial Conduct, and the Attorney's Oath of Office.